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ABSTRACT

Hearings were held by the Senate Subcommittee on Patents, Trademarks, and Copyrights to consider legislation (S. 1361) for the general revision of the copyright law, Title 17 of the United States Code. This report presents the text of S. 1361 and a transcript of the testimony of witnesses given on July 31 and August 1, 1973, in reference to five selected copyright issues: library photocopying, general educational exemptions, the cable television royalty schedule, a religious broadcasting exemption, and carriage of sporting events by cable television. The appendix includes 49 additional statements by publishing, broadcasting, library and professional associations and by several members of Congress. (SL)

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COPYRIGHT LAW REVISION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

Pursuant to S. Res. 56

ON

S. 1361

JULY 31 AND AUGUST 1, 1973

Printed for the use of the Committee on the Judiciary

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BEST COPY AVAILABLE

COPYRIGHT LAW REVISION

TUESDAY, JULY 31, 1973

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:05 a.m., in room 1114, Dirksen Senate Office Building, Senator John L. McClellan presiding.

Present: Senator McClellan [presiding], Burdick, Fong.

Also present: Thomas C. Brennan, chief counsel.

Senator MCCLELLAN. The committee will come to order. I understand other members of the committee may be present later but we will not wait on them. We will begin.

We are so occupied with our duties today, they are so voluminous and so burdensome, Senators just can't be everywhere they should be and all places they should be. Time just does not permit it. I am supposed to be in an appropriation conference this morning over in the House; I could not do that; I had to leave my proxy. So we will just have to proceed and take up the time we have allotted to this today and tomorrow whether others can attend or not.

The Chair would like to make this brief, opening statement.

The subcommittee today is reopening the hearings on legislation for general revision of the copyright law, S. 1361.

Some commentators in recent years have expressed concern that the Congress has too frequently yielded the initiative in legislative matters to the executive branch of the Government.

The legislation that is before us today is exclusively the work product of the legislative branch of the Government and despite the many other pressing demands upon the time of the Members of Congress, I think it is appropriate that we now undertake to process the pending bill which incorporates a copyright revision program.

The subcommittee has previously held 17 days of hearings on copyright revision, during which time we received testimony from approximately 150 witnesses. A number of public and staff conferences were held subsequent to the earlier hearings.

So now without objection, the Chair directs that the previous hearings on S. 1006 of the 89th Congress and S. 597 of the 90th Congress be incorporated by reference as part of the proceedings on S. 1361.

Action on copyright legislation has been necessarily delayed awaiting a resolution of several issues, most notably the formulation by the Federal Communications Commission of a new cable television regulatory scheme. This has now been accomplished through the able leadership of Chairman Dean Burch.

Now today and tomorrow we will hear testimony of witnesses on selected copyright issues, concerning which there have been developments since the previous hearings. There are a number of other controversial issues in this legislation and these will be further reviewed by the subcommittee as the bill is processed.

Mr. Counsel, do you have any statement before we proceed?

Mr. BRENNAN. Yes, I do, Mr. Chairman. I request at this time that the notice of this hearing to be followed by the text of the bill, S. 1361, be printed in the record.

Senator McCLELLAN. The notice of the hearing and a copy of S. 1361, the bill under consideration will be printed in the record at this point.

[The notice of the hearing and a copy of the bill, S. 1361, follow:]

[Congressional Record—Senate, July 10, 1973]

NOTICE OF HEARINGS ON S. 1361

Mr. McCLELLAN. Mr. President, as chairman of the Subcommittee on Patents, Trademarks and Copyrights I previously announced that the subcommittee would reopen the hearings on legislation for the general revision of the copyright law, S. 1361, to receive additional testimony on selected issues.

The dates and issues of the hearings are as follows: July 31, morning—library photocopying; July 31, afternoon—general educational exemptions; August 1, morning—cable television royalty schedule; August 1, afternoon—carriage of sporting events by cable television, and August 1, afternoon—religious broadcasting exemption.

The hearings will commence each day at 10 a.m. and 2 p.m. in room 1114 of the Dirksen Senate Office Building.

The subcommittee will allocate time to the principal representatives of the various points of view on each issue. Those who cannot be accommodated during the hearings may submit written statements for inclusion in the record.

Those who desire additional information should contact the staff of the subcommittee at 225–2268.

93d CONGRESS
1st Session

S. 1361

IN THE SENATE OF THE UNITED STATES

March 26, 1973

Mr. McClellan introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL REVISION OF COPYRIGHT LAW

Sec. 101. Title 17 of the United States Code, entitled "Copyrights," is hereby amended in its entirety to read as follows:

TITLE 17—COPYRIGHTS

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1. Subject Matter and Scope of Copyright	101
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3. Duration of Copyright	301
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102. Subject matter of copyright: In general.
103. Subject matters of copyright: Compilations and derivative works.
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TITLE 17—COPYRIGHTS—Continued

Chapter 1.—SUBJECT MATTER AND SCOPE OF COPYRIGHT—Continued

Sec.
109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.
110. Limitations on exclusive rights: Exemption of certain performances and displays.
111. Limitations on exclusive rights: Secondary transmissions.
112. Limitations on exclusive rights: Ephemeral recordings.
113. Scope of exclusive rights in pictorial, graphic, and sculptural works.
114. Scope of exclusive rights in sound recordings.
115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.
116. Scope of exclusive rights in nondramatic musical works and sound recordings: Public performances by means of coinoperated phonorecord players.
117. Scope of exclusive rights: Use in conjunction with computers and similar information systems.

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are his immediate offspring, whether legitimate or not, and any children legally adopted by him.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "device," "machine," or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied.

A transmitting organization's "local service area" is defined in accordance with the provisions of section 111(f)(2)(C).

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible, and, in the case of a sound recording, to make audible the sounds fixed in it.

"Phonorecords" are material objects in which sounds other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecord" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, plans, diagrams, and models.

A "pseudonymous work" is a work on the copies or phonorecords, of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or photorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.

To perform or display a work "publicly" means:

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to

the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

The "United States," when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article."

The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of his official duties.

A "work made for hire" is:

(1) a work prepared by an employee within the scope of his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, as a photographic or other portrait of one or more persons, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. A "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes. An "instructional text" is a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, plan, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and does not imply any exclusive right in the pre-existing material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the pre-existing material.

§ 104. Subject matter of copyright: National origin

(a) Unpublished Works.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) Published Works.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention of 1952; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(4) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, he may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any

such proclamation or impose any conditions or limitations on protection under a proclamation.

§ 105. Subject matter of copyright: United States Government works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 117, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures and other audiovisual works, and sound recordings, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or distribute such copy or phonorecord, under the conditions specified by this section and if:

(1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; and

(2) The collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field,

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States, including authorized reproducing services.

(d) The rights of reproduction and distribution under this section apply to a copy of a work other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, if:

(1) The user has established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services;

(2) The copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and

(3) The library or archives displays prominently, at the place

where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises, provided that such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy, if it exceeds fair use as provided by section 107;

(3) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed by the library or archives when it obtained a copy or phonorecord of the work for its collections.

(f) The rights of reproducing or distributing "no more than one copy or phonorecord" in accordance with this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same work on separate occasions, but do not extend to cases where the library or archives, or its employee, is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same work, whether on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.

§ 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Nothwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or of a sound recording, or display of a work, by or in the course of a transmission, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or of a sound recording, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work or of a sound recording, otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions:

(i) The notice shall be in writing and signed by the copyright owner or his duly authorized agent; and

(ii) The notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for his objections; and

(iii) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) performance of a nondramatic musical work or of a sound recording in the course of an annual agricultural or horticultural fair or exhibition conducted by a governmental body or a nonprofit agricultural or horticultural organization;

(7) performance of a nondramatic musical work or of a sound recording by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work and the performance is not transmitted beyond the place where the establishment is located.

§ 111. Limitations on exclusive rights: Secondary transmissions

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by a common, contract, or special carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmission; or

(4) the secondary transmission is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) Subject to the provisions of subsections (a) and (b), but notwithstanding the provisions of clauses (2) and (4) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is subject to compulsory licensing under the conditions specified by subsection (d), in the following cases:

(A) Where the signals comprising the primary transmission are exclusively aural; or

(B) Where the reference point of the cable system is within the local service area of the primary transmitter; or

(C) Where the reference point of the cable system is outside any United States television market, as defined in accordance with subsection (f).

(2) Subject to the provisions of subsections (a), (b), and (e) and of clauses (1) and (4) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is subject to compulsory licensing under the conditions specified by subsection (d), in the following cases:

(A) Where the reference point of the cable system is within a United States television market, as defined in accordance with subsection (f), but the signal of the primary transmitter—

(i) when added to the signals of those television broadcast stations whose local service areas are within that market, and of any other television broadcast stations whose signals are being regularly and lawfully used under this section by the cable system for secondary transmissions, does not exceed the number of signals of stations specified by clause (3) as comprising adequate television service for that market; and

(ii) is the signal of a television broadcast station of the type whose lack deprives the market of adequate service in accordance with the standards specified by clause (3), and is closer to the market than the signal of any other station of the same type, whose local service area is not within the market; or

(B) Where, notwithstanding the provisions of subclause (A), the cable system or its predecessor in title had, before January 1, 1971, in accordance with the applicable rules of the Federal Communications Commission, made regular secondary transmissions of the transmissions of the primary transmitter or its predecessor in title. And provided that such regular secondary transmissions shall be exempt from the requirements of clauses (4)(A) and (4)(B) of subsection (c).

(3) For the purposes of this subsection, "adequate television service" within a United States television market is defined according to the numerical rank of the market and the number and type of those operating broadcast stations licensed by the Federal Communications Commission whose local service areas are within that market. Construction permits shall not be included in any computation for this purpose.

(A) In markets 1 through 50, adequate television service comprises the network stations transmitting the programs of all the television networks providing national transmissions, three independent commercial stations, and one noncommercial educational station.

(B) In markets 51 and below, adequate television service comprises the network stations transmitting the programs of all the television networks providing national transmissions, two independent commercial stations, and one noncommercial educational station.

(4) Subject to the provisions of subsections (a) and (b) and of clause (1) of this subsection, but notwithstanding the provisions of clause (2) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the cable system, at least one month before the date of the secondary transmission, has not recorded the notice specified by subsection (d); or

(B) Where the reference point of the cable system falls within a circle defined by a radius of thirty-five air miles, or within a radius as subsequently determined by the Federal Communications Commission, after notice and public hearings, from the center of a United States television market, as defined in accordance with subsection (f), and—

(i) the primary transmission is made by a television broadcast station whose local service area is outside the market; and

(ii) a television broadcast station licensed by the Federal Communications Commission, whose local service area is within the market, has the exclusive right, under an exclusive license or other transfer of copyright, to transmit any performance or display of the same version of the work covered by the exclusive license or other transfer of copyright; and

(iii) except where the market is one of the first fifty of the United States television markets, the particular version of the work covered by the exclusive license or other transfer of copyright has never been transmitted to the public in a syndicated showing in the market by the station specified by paragraph (ii), or by any other television broadcast stations licensed by the Federal Communications Commission whose local service area is within the market; and

(iv) the station specified by paragraph (ii) has given written notice of said exclusive right to the cable system within the specified time limits and in accordance with the other requirements that the Register of Copyrights shall prescribe by regulation.

(C) Where the reference point of the cable system is within a United States television market, as defined in accordance with subsection (f), and—

(i) the content of the particular transmission program consists primarily of an organized professional team sporting event occurring simultaneously with the initial fixation and primary transmission of the program; and

(ii) the secondary transmission is made for reception wholly or partly outside the local service area of the primary transmitter; and

(iii) the secondary transmission is made for reception wholly or partly within the local service area of one or more television broadcasting stations licensed by the Federal Communications Commission, none of which has received authorization to transmit said program within such area.

(d) Compulsory License for Secondary Transmissions by Cable Systems.—

(1) For any secondary transmission to be subject to compulsory

licensing under subsection (c), the cable system shall, at least one month before the date of the secondary transmission, record in the Copyright Office, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, a notice including a statement of the identity and address of the person who owns the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, during the months of January, April, July, and October, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation—

(A) A statement of account, covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers to the cable system, and the gross amounts paid to the cable system by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters; and

(B) A total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period, as follows:

(i) 1 percent of any gross receipts up to $40,000;

(ii) 2 percent of any gross receipts totalling more than $40,000 but not more than $80,000;

(iii) 3 percent of any gross receipts totalling more than $80,000, but not more than $120,000;

(iv) 4 percent of any gross receipts totalling more than $120,000, but not more than $160,000; and

(v) 5 percent of any gross receipts totalling more than $160,000.

The total royalty fee shall include an additional 1 percent of the gross receipts paid by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitter for each channel on which the cable system, under a compulsory license, is permitted by the Federal Communications Commission to increase the number of signals comprising adequate service pursuant to clause (2)(B) of subsection (e).

(3) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions made during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that Register shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws (the Act of October 15, 1914, 38 Stat. 730, and any amendments of any such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under clause (2). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If he finds the existence of a controversy he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(C) After deducting the costs of administration, 15 percent of the royalty fees collected shall be maintained in a special fund, and shall be distributed, according to regulations prescribed by the Register of Copyrights, to the copyright owners, or their designated agents, of musical works.

(D) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) PREEMPTION OF OTHER LAWS AND REGULATIONS.—

(1) Except as provided by clause (2), on and after January 1, 1975, all Federal, State, and local laws and regulations restricting the right of a cable system to make secondary transmissions in any case made subject to compulsory licensing by this section are preempted by this title. Thereafter, unless specifically authorized by this subsection, the

Federal Communications Commission or any other governmental agency or instrumentality shall not issue or enforce any order, notice, rule, or regulation requiring a cable system to obtain authority of the copyright owner as a condition for making any secondary transmission, or prohibiting a cable system from making secondary transmissions within an area where such secondary transmissions are permissible under the compulsory licensing provisions of subsection (c). However, nothing in this section shall be construed to preempt the authority of the Federal Communications Commission, with respect to a cable system whose reference point is within a United States television market—

(A) to prevent the cable system from further transmitting a primary transmission made by a television broadcast station, whose local service area is outside the market, on the same day that another station licensed by the Commission, whose local service area is within the market, transmits the same transmission program;

(B) to compel the cable system to make secondary transmissions of primary transmissions by television broadcast stations licensed by the Commission, whose local service area is within the market; and

(C) to regulate the operations of a cable system otherwise than as provided by this section.

(2) Notwithstanding the provisions of clause (1), the Federal Communications Commission shall have the responsibility to establish various criteria and definitions as provided by subsection (f), and shall have the authority in the public interest, and in accordance with requirements that the Commission shall prescribe by regulation, to do the following:

(A) to permit a cable system to substitute, for the signal of the station specified in the compulsory licensing provisions of paragraph (ii) of subsection (c) (2) (A), a more distant signal;

(B) to increase the number of signals of stations specified in the compulsory licensing provisions of clause (5) of subsection (c) as comprising adequate television service for a United States television market; and

(C) to permit a cable system that is required to delete a signal under the provisions of clause (4) of subsection (c), to substitute the signal of another station of the same kind and within the quantitative limits specified by the compulsory licensing provisions of clause (3) of subsection (c).

(f) DEFINITIONS.—

(1) As used in this section, the following terms and their variant forms mean the following:

(A) A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

(B) A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission.

(C) A "cable system" is a facility operated for purposes of commercial advantage that receives signals transmitted by one or more television broadcast stations licensed by the Federal Communications Commission and simultaneously makes secondary transmissions of such signals by wires, cables, or other communications channels to subscribing members of the public who pay for such service.

(2) As used in this section, the following terms and their variant forms have the meanings given to them in definitions that the Federal Communications Commission shall publish in the Federal Register during July, 1974, and annually in July thereafter. Said definitions shall have binding effect upon the 1st day of January of the year following their publication; they shall be based upon the general criteria provided by this clause, and upon specific criteria adopted by the Commission in the public interest and in the light of changing industry practices and communications technology. Annual publication of the definitions shall be accompanied by publication of lists specifying the reference points for all cable systems in the United States, the numerical rank of all United States television markets, and all network stations, independent commercial stations, and noncommercial educational stations, together with maps showing the specific geographical location of all said reference points, the area encompassed by all said United States television markets, and the local service areas of all said stations.

(A) The "reference point" of a cable system is the longitude and latitude, expressed in degrees, minutes, and seconds, of a point representing the effective center of operations of a cable system, taking into account factors of geography, demography, and concentration of subscribers.

(B) A "United States television market" is a community or group of communities incorporating the local service areas of one or more television broadcast stations licensed by the Federal Communications Commission. The numerical ranking of such a market shall depend primarily upon the number of viewers in the market receiving television signals, but may be affected by other factors including the number of signals available in the market, concentration of population, industrial development, and level of income.

(C) The "local service area" of a broadcast station comprises the entire geographic area within the radius that the station's signal is expected to reach effectively under normal conditions, including any parts of the area within that radius that its signal fails to reach effectively because of terrain, structures, or other physical or technical barriers. Where the local service area of one station overlaps with that of another, the overlapping area is considered within the local service areas of both stations.

(D) A "network station" is a television broadcast station that is owned or operated by, or affiliated with, one of the television networks providing nationwide transmissions, and that transmits substantially all of the programming supplied by such network.

(E) An "independent commercial station" is a television broadcast station operated for commercial advantage, other than a network station.

(F) A "noncommercial educational station" is a station operated without any direct or indirect purpose of commercial advantage, whose programming consists preponderantly of instructional, educational, or cultural subject matter.

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(1) the copy or phonorecord is retained and used solely by the

transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(2) the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

(3) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than twelve copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within five years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord for each transmitting organization specified in clause (2) of this subsection of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the pre-existing works employed in the program.

§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(1) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1974, as held applicable and construed by a court in an action brought under this title.

(2) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

(b) When a pictorial, graphic, or sculptural work in which copyright subsists under this title is utilized in an original ornamental design of a useful article, by the copyright proprietor or under an express license from him, the design shall be eligible for protection under the provisions of title III of this Act.

(c) Protection under this title of a work in which copyright subsists shall terminate with respect to its utilization in useful articles whenever the copyright proprietor has obtained registration of an ornamental design of a useful article embodying said work under the provisions of title III of this Act. Unless and until the copyright proprietor has obtained such registration, the copyright pictorial, graphic, or sculptural work shall continue in all respects to be covered by and subject to the protection afforded by the copyright subsisting under this title. Nothing in this section shall be deemed to create any additional rights or protection under this title.

(d) Nothing in this section shall affect any right or remedy held by any person under this title in a work in which copyright was subsisting on the effective date of title III of this Act, or with respect to any utilization of a copyrighted work other than in the design of a useful article.

§ 114. Scope of exclusive rights in sound recordings

(a) Limitations on Exclusive Rights.—The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (3), and (4) of section 106. The exclusive rights of the owner of copyright in a sound recording to reproduce and perform it are limited to the rights to duplicate the sound recording in the form of phonorecords or copies of audiovisual works that directly or indirectly recapture the actual sounds fixed in the recording, and to perform those actual sounds. These rights do not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to the performance of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

(b) Performance Rights Distinct.—The exclusive right to perform publicly, by means of a phonorecord, a copyrighted literary, musical, or dramatic work, and the exclusive right to perform publicly a copyrighted sound recording, are separate and independent rights under this title.

(c) Compulsory License for Public Performance of Sound Recordings.—

(1) Subject to the provisions of sections 111 and 116, the public performance of a sound recording is subject to compulsory licensing under the conditions specified by this subsection, if phonorecords of it have been distributed to the public under the authority of the copyright owner.

(2) Any person who wishes to obtain a complsory license under this subsection shall fulfill the following requirements:

(A) He shall at least one month before the public performance and thereafter at intervals and in accordance with requirements that the Register of Copyrights shall prescribe by regulation, record in the Copyright Office a notice stating his identity and address and declaring his intention to obtain a compulsory license under this subsection;

(B) Deposit with the Register of Copyrights, at annual intervals in accordance with requirements that the Register of Copyrights shall prescribe by regulation, a statement of account and a total royalty fee for the period covered by the statement, based on the royalty rates specified by clause (4).

(3) In the absence of a negotiated license, failure to record the notice, file the statement, or deposit the royalty fee prescribed by clause (2) renders the public performance of a sound recording actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 505 but not including the criminal remedies provided by section 506.

(4) The annual royalty fees under this subsection may, at the user's option, be computed on either a blanket or a prorated basis. Although a negotiated license may be substituted for the compulsory license prescribed by this subsection, in no case shall the negotiated rate amount to less than the applicable rate provided by this clause. The following rates shall be applicable:

(A) For a radio or television broadcast station licensed by the Federal Communications Commission, the blanket rate is 2 percent of the net receipts from advertising sponsors during the applicable period. The alternative prorated rate is a fraction of 2 percent of such net receipts, based on a calculation made in accordance with a standard formula that the Register of Copyrights shall prescribe by regulation, taking into account the amount of the station's commercial time devoted to playing copyrighted sound recordings and whether the station is a radio or television broadcaster.

(B) Subject to section 111, for background music services and other transmitters of performances of sound recordings the blanket rate is 2 percent of the gross receipts from subscribers or others who pay to receive the transmission during the applicable period. The alternative prorated rate is a fraction of 2 percent of such gross receipts, based on a calculation made in accordance with a standard formula that the Register of Copyrights shall prescribe by regulation, taking into account the proportion of time devoted to musical performances by the transmitter during the applicable period, and the extent to which the transmitter is also the owner of copyright in the sound recordings performed during said period.

(C) For an operator of coin-operated phonorecord players, as that term is defined by section 116, and for a cable system, as that term is defined by section 111, the compulsory licensing rates shall be governed exclusively by those respective sections, and not by this subsection.

(D) For all other users not otherwise exempted, the blanket rate is $25 per year for each location at which copyrighted sound recordings are performed. The alternative prorated rate shall be based on the number of separate performances of such works during the year and, in accordance with a standard formula that the Register of Copyrights shall prescribe by regulation, shall not exceed $5 per day of use.

(d) EXEMPTIONS.—In addition to users exempted from liability by section 110 or subject to the provisions of section 111 or 116, any person who publicly performs a copyrighted sound recording and who would otherwise be subject to liability for such performance is exempted from liability for infringement and from the compulsory licensing requirements of this section, during the applicable annual period, if—

(1) In the case of a broadcast station, its gross receipts from advertising sponsors were less than $25,000; or

(2) In the case of a background music service or other transmitter of performances of sound recordings, its gross receipts from subscribers or others who pay to receive the transmission were less than $10,000.

(e) DISTRIBUTION OF ROYALTIES.—

(1) During the month of September in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 809 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(2) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws (the Act of October 15, 1914, 38 Stat. 730, and any amendments of any such laws), for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and

file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(2) After the first day of October of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (B) of subsection (c)(2). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If he finds that such a controversy exists he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(3) For the purposes of this section—

(A) One half of all royalties to be distributed shall be paid to the copyright owners, and the other half shall be paid to the performers, of the sound recordings for which claims have been made under clause (1); and

(B) During the pendency of any proceeding under this section, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(f) Relation to Other Sections.—The public performance of sound recordings by means of secondary transmissions and coin-operated phonorecord players is governed by sections 111 and 116, respectively, and not by this section, except that there shall be an equal distribution of royalty fees for such public performances between copyright owners and performers as provided by subsection (e)(3)(A) of this section.

(g) Definitions.—As used in this section, the following terms and their variant forms mean the following:

(1) "Commercial time" is any transmission program, the time for which is paid for by a commercial sponsor, or any transmission program that is interrupted by a spot commercial announcement at intervals of less than fourteen and one-half minutes.

(2) "Performers" are musicians, singers, conductors, actors,

narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording.

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of intrpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE; DESIGNATION OF OWNER OF PERFORMANCE RIGHT.—

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of his intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served on him, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) If the copyright owner so requests in writing not later than ten days after service or filing of the notice required by clause (1), the person exercising the compulsory license shall designate, on a label or container accompanying each phonorecord of the work

distributed by him, and in the form and manner that the Register of Copyrights shall prescribe by regulation, the name of the copyright owner or his agent to whom royalties for public performance of the work are to be paid.

(3) Failure to serve or file the notice required by clause (1), or to designate the name of the owner or agent as required by clause (2), forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

(c) Royalty Payable Under Compulsory License.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after he is so identified but he is not entitled to recover for any phonorecords previously made and distributed.

(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. With respect to each work embodied in the phonorecord, the royalty shall be either two and one-half cents, or one half cent per minute of playing time or fraction thereof, whichever amount is larger.

(3) Royalty payments shall be made quarterly, in January, April, July, and October, and shall include all royalties for the three months next preceding. Each quarterly payment shall be accompanied by a detailed statement of account, which shall comply in form, content, and manner of certification with requirements that the Register of Copyrights shall prescribe by regulation.

(4) If the copyright owner does not receive the quarterly payment and statement of account when due, he may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders the making and distribution of all phonorecords, for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

§ 116. Scope of exclusive rights in nondramatic musical works and sound recordings: Public performances by means of coin-operated phonorecord players

(a) Limitation on Exclusive Right.—In the case of a nondramatic musical work embodied in a phonorecord, and in the case of a sound recording, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless:

(A) he is the operator of the phonorecord player; or

(B) he refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate required by subclause (1)(C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).

(b) Recordation of Coin-Operated Phonorecord Player, Affixation of Certificate, and Royalty Payable Under Compulsory License.—

(1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phonorecord player shall fulfill the following requirements:

(A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available in that particular phonorecord player, he shall file in the Copyright Office, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, an application containing the name and address of the operator of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player, and in addition to the fee prescribed by clause (9) of section 708(a), he shall deposit with the Register of Copyrights a royalty fee for the current calendar year of $9 for that particular phonorecord player. If such performances are made available on a particular phonorecord player for the first time after July 1 of any year, the royalty fee to be deposited for the remainder of that year shall be $4.50.

(B) Within twenty days of receipt of an application and a royalty fee pursuant to subclause (A), the Register of Copyrights shall issue to the applicant a certificate for the phonorecord player.

(C) On or before March 1 of the year in which the certificate prescribed by subclause (B) of this clause is issued, or within ten days after the date of issue of the certificate, the operator shall affix to the particular phonorecord player, in a position where it can be readily examined by the public, the certificate, issued by the Register of Copyrights under subclause (B), of the latest application made by him under subclause (A) of this clause with respect to that phonorecord player.

(2) Failure to file the application, to affix the certificate or to pay the royalty required by clause (1) of this subsection renders the public performance actionable as an act of infringement under section 501 and fully subject to the remedies provided by section 502 through 506.

(c) Distribution of Royalties.—

(1) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 809 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (a) of subsection (b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws (the Act of October 15, 1914, 38 Stat. 730, and any amendments of any such laws), for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and

file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(2) After the first day of October of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners and performers entitled, or to their designated agents. If he finds that such a controversy exists he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(3) The fees to be distributed shall be divided as follows:

(A) One ninth of the fees to be distributed shall be allocated to copyright owners and performers of sound recordings, and the remainder to owners of copyright in nondramatic musical works;

(B) The fees allocated to copyright owners and performers of sound recordings shall be divided equally between them, as provided by section 114(f);

(C) The fees allocated to owners of copyright in nondramatic musical works shall be distributed as follows:

(i) Every copyright owner not affiliated with a performing rights society shall receive the pro rata share of the fees to be distributed to which such copyright owner proves his entitlement; and

(ii) The performing rights societies shall receive the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove their entitlement.

(D) During the pendency of any proceeding under this section, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(4) The Register of Copyrights shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. Any person who alleges that he has been denied the access permitted under the regulations prescribed by the Register of Copyrights may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

(d) CRIMINAL PENALTIES.—Any person who knowingly makes a false representation of a material fact in an application filed under clause (1)(A) of subsection (b), or who knowingly alters a certificate issued under clause (1)(B) of subsection (b) or knowingly affixes such a certificate to a phonorecord player other than the one it covers, shall be fined not more than $2,500.

(e) DEFINITIONS.—As used in this section, the following terms and their variant forms mean the following:

(1) A "coin-operated phonorecord player" is a machine or device that:

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of a coin;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An "operator" is any person who, alone or jointly with others:

(A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance in a coin-operated phonorecord player.

(3) A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

§ 117. Scope of exclusive rights: Use in conjunction with computers and similar information systems

Notwithstanding the provisions of sections 106 through 116, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1974, as held applicable and construed by a court in an action brought under this title.

Chapter 2.—COPYRIGHT OWNERSHIP AND TRANSFER

Sec.
201. Ownership of copyright.
202. Ownership of copyright as distinct from ownership of material object.
203. Termination of transfers and licenses granted by the author.
204. Execution of transfers of copyright ownership.
205. Recordation of transfers and other documents.

§ 201. Ownership of copyright

(a) Initial Ownership.—Copyright in work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) Works Made for Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works.—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

§ 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

§ 203. Termination of transfers and licenses granted by the author

(a) Conditions for Termination.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1975, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if he is dead, by

the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, his termination interest may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of his interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow (or her widower) and children or grandchildren as follows:

(A) The widow (or widower) owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow (or widower) owns one half of the author's interest;

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow (or widower), in which case the ownership of one half of the author's interest is divided among them;

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of his children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or his successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) EFFECT OF TERMINATION.—Upon the effective date of termination, all rights under this title that were covered by the terminated grant revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a termi-

nated grant have vested in him, his legal representatives, legatees, or heirs at law represent him for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

§ 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or his duly authorized agent.

(b) A certificate of acknowledgement is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if:

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

§ 205. Recordation of transfers and other documents

(a) Conditions for Recordation.—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document.

(b) Certificate of Recordation.—The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

(c) RECORDATION AS CONSTRUCTIVE NOTICE.—Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if:

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which he claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

(e) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution abroad, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(f) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NONEXCLUSIVE LICENSE.—A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or his duly authorized agent, and if:

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

Chapter 3.—DURATION OF COPYRIGHT

Sec.
301. Pre-emption with respect to other laws.
302. Duration of copyright: Works created on or after January 1, 1975.
303. Duration of copyright: Works created but not published or copyrighted before January 1, 1975.
304. Duration of copyright: Subsisting copyrights.
305. Duration of copyright: Terminal date.

§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1975, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression;

(2) any cause of action arising from undertakings commenced before January 1, 1975;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

§ 302. Duration of copyright: Works created on or after January 1, 1975

(a) In General.—Copyright in a work created on or after January 1, 7975, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after his death.

(b) Joint Works.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after his death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsection (a) or (d) of section 407, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsections (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of his interest, the source of his information, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) RECORDS RELATING TO DEATH OF AUTHORS.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of his interest, and the source of his information, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent he considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) PRESUMPTION AS TO AUTHOR'S DEATH.—After a period of seventy-five years from the year of first publication of a work, or a period of one hundred years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than fifty years before, is entitled to the benefit of a presumption that the author has been dead for at least fifty years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1975

Copyright in a work created before January 1, 1975, but not theretofore in the public domain or copyright, subsists from January 1, 1975, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 1999; and, if the work is published on or before December 31, 1999, the term of copyright shall not expire before December 31, 2024.

§ 304. Duration of copyright: Subsisting copyrights

(a) Copyrights in Their First Term on January 1, 1975.—Any copyright, the first term of which is subsisting on January 1, 1975, shall endure for twenty-eight years from the date it was originally secured: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

(b) Copyrights in Their Renewal Term or Registered for Renewal Before January 1, 1975.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1973, and December 31, 1974, inclusive, or for which renewal registration is made between December 31, 1973, and December 31, 1974, inclusive, is extended to endure for a term of 75 years from the date copyright was originally secured.

(c) Termination of Transfers and Licenses Covering Extended Renewal Term.—In the case of any copyright subsisting in either its first renewal term on January 1, 1975, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or of any right under it, executed before January 1, 1975, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following condition:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow (or her widower) and children or grandchildren as follows:

(A) The widow (or widower) owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow (or widower) owns one half of the author's interest;

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow (or widower), in which case the ownership of one half of the author's interest is divided among them;

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of his children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1975, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or his successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to termi-

nate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by him or his duly authorized agent or, if he is dead, by the number and proportion of the owners of his termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if he is dead, to the persons owning his termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where an author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him, his legal representatives, legatees, or heirs at law represent him for purposes of this subclass.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

§ 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

Chapter 4.—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

Sec.
401. Notice of copyright: Visually perceptible copies.
402. Notice of copyright: Phonorecords of sound recordings.
403. Notice of copyright: Publications incorporating United States Government works.
404. Notice of copyright: Contributions to collective works.
405. Notice of copyight: Omission of notice.
406. Notice of copyright: Error in name or date.
407. Deposit of copies or phonorecords for Library of Congress.
408. Copyright registration in general.
[illegible]. Application for registration.
[illegible]. Registration of claim and issuance of certificate.
411. Registration as prerequisite to infringement suit.
412. Registration as prerequisite to certain remedies for infringement.

§ 401. Notice of copyright: Visually perceptible copies

(a) General Requirement.—Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) Form of Notice.—The notice appearing on the copies shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), the word "Copyright," or the abbreviation "Copr.";

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles;

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

(c) Position of Notice.—The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

§ 402. Notice of copyright: Phonorecords of sound recordings

(a) General Requirement.—Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed phonorecords of the sound recording.

(b) FORM OF NOTICE.—The notice appearing on the phonorecords shall consist of the following three elements:

(1) the symbol ℗ (the letter P in a circle);

(2) the year of first publication of the sound recording;

(3) the name of the owner of copyrights in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

(c) POSITION OF NOTICE.—The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.

§ 403. Notice of copyright: Publications incorporating United States Government works

Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by section 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

§ 404. Notice of copyright: Contributions to collective works

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 through 403. However, a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements of sections 401 through 403 with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) Where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 406(a).

§ 405. Notice of copyright: Omission of notice

(a) EFFECT OF OMISSION ON COPYRIGHT.—The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if:

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

(b) EFFECT OF OMISSION ON INNOCENT INFRINGERS.—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work had been made under section 408, if he proves that he was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the infringer to continue his undertaking, that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

(c) REMOVAL OF NOTICE.—Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords.

§ 406. Notice of copyright: Error in name or date

(a) ERROR IN NAME.—Where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if he proves that he was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun:

(1) registration for the work had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.

The person named in the notice is liable to account to the copyright owner for all receipts from purported transfers or licenses made by him under the copyright.

(b) Error in Date.—When the year date in the notice on copies or phonorecords distributed by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.

(c) Omission of Name or Date.—Where copies or phonorecords publicly distributed by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405.

§ 407. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication:

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually-perceptible material published with such phonorecords.

This deposit is not a condition of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable:

(1) to a fine of not more than $250 for each work; and

(2) to pay to the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them.

§ 408. Copyright registration in general

(a) Registration Permissive.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of section 405(a), such registration is not a condition of copyright protection.

(b) Deposit for Copyright Registration.—Except as provided by subsection (c), the material deposited for registration shall include:

(1) in the case of an unpublished work, one complete copy or phonorecord;

(2) in the case of a published work, two complete copies or phonorecords of the best edition;

(3) in the case of a work first published abroad, one complete copy or phonorecord as so published;

(4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require.

(c) Administrative Classification and Optional Deposit.—The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(d) Corrections and Amplifications.—The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) Published Edition of Previously Registered Work.—Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.

§ 409. Application for registration

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include:

(1) the name and address of the copyright claimant;

(2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors and, if one or more of the authors is dead, the dates of their deaths;

(3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;

(4) in the case of a work made for hire, a statement to this effect;

(5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;

(6) the title of the work, together with any previous or alternative titles under which the work can be identified;

(7) the year in which creation of the work was completed;

(8) if the work has been published, the date and nation of its first publication;

(9) in the case of a compilation or derivative work, an identi-

fication of any pre-existing work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered;

(10) in the case of a published work containing material of which copies are required by section 601 to be manufactured in the United States, the names of the persons or organizations who performed the processes specified by subsection (c) of section 601 with respect to that material, and the places where those processes were performed: and

(11) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

§ 410. Registration of claim and issuance of certificate

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, he shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, he shall refuse registration and shall notify the applicant in writing of the reasons for his action.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

§ 411. Registration as prerequisite to infringement suit

(a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his option, become a party to the action with respect to the issue of registrability of the copyright claim by entering his appearance within sixty days after such service, but his failure to do so shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work within three months after its first transmission.

§ 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for:

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after its first publication.

Chapter 5.—COPYRIGHT INFRINGEMENT AND REMEDIES

Sec.

501. Infringement of copyright.
502. Remedies for infringement: Injunctions.
503. Remedies for infringement: Impounding and disposition of infringing articles.
504. Remedies for infringement: Damages and profits.
505. Remedies for infringement: Costs and attorney's fees.
506. Criminal offenses.
507. Limitations on actions.
508. Notification of filing and determination of actions.

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 117, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411, to institute an action for any infringement of that particular right committed while he is the owner of it. The court may require him to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

§ 502. Remedies for infringement: Injunctions

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in his office.

§ 503. Remedies for infringement: Impounding and disposition of infringing articles

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

§ 504. Remedies for infringement: Damages and profits

(a) IN GENERAL.—Except as otherwise provided by this title, an infringer of copyright is liable for either:

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

(b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) STATUTORY DAMAGES.—

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $250 or more than $10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that he was not aware and had no reason to believe that his acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100. In a case where an instructor, librarian or archivist in a nonprofit educational institution, library, or archives, who infringed by reproducing a copyrighted work in

copies or phonorecords, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.

§ 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

§ 506. Criminal offenses

(a) Criminal Infringement.—Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $2,500 or imprisoned not more than one year, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than one year, or both, for any subsequent offense.

(b) Fraudulent Copyright Notice.—Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that he knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that he knows to be false, shall be fined not more than $2,500.

(c) Fraudulent Removal of Copyright Notice.—Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.

(d) False Representation.—Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

§ 507. Limitations on actions

(a) Criminal Proceedings.—No criminal proceeding shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose.

(b) Civil Actions.—No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

§ 508. Notification of filing and determination of actions

(a) Within one month after the filing of any action under this title, the clerks of the courts of the United States shall send written notification to the Register of Copyrights setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the title, author, and registration number of each work involved in the action. If any other copyrighted work is later included in the action by amendment, answer, or other pleading, the clerk shall also send a notification concerning it to the Register within one month after the pleading is filed.

(b) Within one month after any final order or judgment is issued in the case, the clerk of the court shall notify the Register of it, sending him a copy of the order or judgment together with the written opinion, if any, of the court.

(c) Upon receiving the notifications specified in this section, the Register shall make them a part of the public records of the Copyright Office.

Chapter 6.—MANUFACTURING REQUIREMENT AND IMPORTATION

Sec.
601. Manufacture, importation, and public distribution of certain copies.
602. Infringing importation of copies or phonorecords.
603. Importation prohibitions: Enforcement and disposition of excluded articles.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.

(b) The provisions of subsection (a) do not apply:

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a national nor a domiciliary of the United States or, if he is a national of the United States, has been domiciled outside of the United States for a continuous period of at least one year immediately preceding that date; in the case of a work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a na-

tional or domiciliary of the United States or a domestic corporation or enterprise;

(2) where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than two thousand copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by him at the time of registration for the work under section 408 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the government of the United States or of any State or political subdivision of a State;

(4) where importation, for use and not for sale, is sought:

(A) by any person with respect to no more than one copy of any one work at any one time;

(B) by any person arriving from abroad, with respect to copies forming part of his personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library;

(5) where the copies are reproduced in raised characters for the use of the blind;

(6) where, in addition to copies imported under clauses (3) and (4) of this subsection, no more than two thousand copies of any one such work, which have not been manufactured in the United States or Canada, are publicly distributed in the United States.

(c) The requirement of this section that copies be manufactured in the United States or Canada is satisfied if:

(1) in the case where the copies are printed directly from type that has been set, or directly from plates made from such type, the setting of the type and the making of the plates have been performed in the United States or Canada; or

(2) in the case where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies, the making of the plates has been performed in the United States or Canada; and

(3) in any case, the printing or other final process of producing multiple copies and any binding of the copies have been performed in the United States or Canada.

(d) Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any civil action or criminal proceeding for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense with respect to all of the nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material, if he proves:

(1) that copies of the work have been imported into or publicly distributed in the United States in violation of this section by or with the authority of the owner of such exclusive rights; and

(2) that the infringing copies were manufactured in the United States or Canada in accordance with the provisions of subsection (c); and

(3) that the infringement was commenced before the effective date of registration for an authorized edition of the work, the copies of which have been manufactured in the United States or Canada in accordance with the provisions of subsection (c).

(e) In any action for infringement of the exclusive rights to reproduce and distribute copies of a work containing material required by this section to be manufactured in the United States or Canada, the copyright owner shall set forth in the complaint the names of the persons or organizations who performed the processes specified by subsection (c) with respect to that material, and the places where those processes were performed.

§ 602. Infringing importation of copies or phonorecords

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired abroad is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to:

(1) importation of copies or phonorecords under the authority or for the use of the government of the United States or of any State or political subdivision of a State but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;

(2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any

person arriving from abroad with respect to copies or phonorecords forming part of his personal baggage; or

(3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes.

(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the Bureau of Customs has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Bureau of the importation of articles that appear to be copies or phonorecords of the work.

§ 603. Importation prohibitions: Enforcement and disposition of excluded articles

(a) The Secretary of the Treasury and the Postmaster General shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

(b) These regulations may require, as a condition for the exclusion of articles under section 602:

(1) that the person seeking exclusion obtain a court order enjoining importation of the articles; or

(2) that he furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which he claims an interest is valid and that the importation would violate the prohibition in section 602; he may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(c) Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his acts constituted a violation of law.

Chapter 7.—COPYRIGHT OFFICE

Sec.
701. The Copyright Office: General responsibilities and organization.
702. Copyright Office regulations.
703. Effective date of actions in Copyright Office.
704. Retention and disposition of articles deposited in Copyright Office.
705. Copyright Office records: Preparation, maintenance, public inspection, and searching.
706. Copies of Copyright Office records.
707. Copyright Office forms and publications.
708. Copyright Office fees.

§ 701. The Copyright Office: General responsibilities and organization

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office in the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under his general direction and supervision.

(b) The Register of Copyrights shall adopt a seal to be used on and after January 1, 1975, to authenticate all certified documents issued by the Copyright Office.

(c) The Register of Copyrights shall make an annual report to the Librarian of Congress of the work and accomplishments of the Copyright Office during the previous fiscal year. The annual report of the Register of Copyrights shall be published separately and as a part of the annual report of the Librarian of Congress.

§ 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

§ 703. Effective date of actions in Copyright Office

In any case in which time limits are prescribed under this title for the performance of an action in the Copyright Office, and in which the last day of the prescribed period falls on a Saturday, Sunday, holiday or other non-business day within the District of Columbia or the Federal Government, the action may be taken on the next succeeding business day, and is effective as of the date when the period expired.

§ 704. Retention and disposition of articles deposited in Copyright Office

(a) Upon their deposit in the Copyright Office under sections 407 and 408, all copies, phonorecords, and identifying material, including those deposited in connection with claims that have been refused registration, are the property of the United States Government.

(b) In the case of published works, all copies, phonorecords, and identifying material deposited are available to the Library of Congress for its collections, or for exchange or transfer to any other library. In the case of unpublished works, the Library is entitled to select any deposits for its collections.

(c) Deposits not selected by the Library under subsection (b), or identifying portions or reproductions of them, shall be retained under the control of the Copyright Office, including retention in Government storage facilities, for the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress. After that period it is within the joint discretion of the Register and the Librarian to order their destruction or other disposition; but, in the case of unpublished works, no deposit shall be destroyed or otherwise disposed of during its term of copyright.

(d) The depositor of copies, phonorecords, or identifying material under section 408, or the copyright owner of record, may request retention, under the control of the Copyright Office, of one or more of such articles for the full term of copyright in the work. The Register of Copyrights shall prescribe, by regulation, the conditions under which such requests are to be made and granted, and shall fix the fee to be charged under section 708(12) if the request is granted.

§ 705. Copyright Office records: Preparation, maintenance, public inspection, and searching

(a) The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordations, and other actions taken under this title, and shall prepare indexes of all such records.

(b) Such records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office, shall be open to public inspection.

(c) Upon request and payment of the fee specified by section 708, the Copyright Office shall make a search of its public records, indexes, and deposits, and shall furnish a report of the information they disclose with respect to any particular deposits, registrations, or recorded documents.

§ 706. Copies of Copyright Office records

(a) Copies may be made of any public records or indexes of the Copyright Office; additional certificates of copyright registration and copies of any public records or indexes may be furnished upon request and payment of the fees specified by section 708.

(b) Copies or reproductions of deposited articles retained under the control of the Copyright Office shall be authorized or furnished only under the conditions specified by the Copyright Office regulations.

§ 707. Copyright Office forms and publications

(a) Catalog of Copyright Entries.—The Register of Copyrights shall compile and publish at periodic intervals catalogs of all copyright registrations. These catalogs shall be divided into parts in accordance with the various classes of works, and the Register has discretion to determine on the basis of practicability and usefulness, the form and frequency of publication of each particular part.

(b) Other Publications.—The Register shall furnish, free of charge upon request, application forms for copyright registration and general informational material in connection with the functions of the Copyright Office. He also has authority to publish compilations of information, bibliographies, and other material he considers to be of value to the public.

(c) Distribution of Publications.—All publications of the Copyright Office shall be furnished to depository libraries as specified under section 1905 of title 44, United States Code, and, aside from those furnished free of charge, shall be offered for sale to the public at prices based on the cost of reproduction and distribution.

§ 708. Copyright Office fees

(a) The following fees shall be paid to the Register of Copyrights:

(1) for the registration of a copyright claim or a supplementary registration under section 408, including the issuance of a certificate of registration, $6;

(2) for the registration of a claim to renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration, $4;

(3) for the issuance of a receipt for a deposit under section 407, $2;

(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document of six pages or less, covering no more than one title, $5; for each page over six and for each title over one, 50 cents additional;

(5) for the filing, under section 115(b), of a notice of intention to make phonorecords, $3;

(6) for the recordation, under section 302(c), of a statement revealing the identity of an author of an anonymous or pseudonymous work, or for the recordation, under section 302(d), of a statement relating to the death of an author, $5 for a document of six pages or less, covering no more than one title; for each page over six and for each title over one, 50 cents additional;

(7) for the issuance, under section 601, of an import statement, $3;

(8) for the issuance, under section 706, of an additional certificate of registration, $2;

(9) for the issuance, under section 116, of a certificate for the recordation of a phonorecord player, 50 cents;

(10) for the issuance of any other certification, $3; the Register of Copyrights has discretion, on the basis of their cost, to fix the fees for preparing copies of Copyright Office records, whether they are to be certified or not;

(11) for the making and reporting of a search as provided by section 705, and for any related services, $5 for each hour or fraction of an hour consumed;

(12) for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

(b) The fees prescribed by or under this section are applicable to the United States Government and any of its agencies, employees, or officers, but the Register of Copyrights has discretion to waive the requirement of this subsection in occasional or isolated cases involving relatively small amounts.

Chapter 8.—COPYRIGHT ROYALTY TRIBUNAL

Sec.

801. Copyright Royalty Tribunal; Establishment and purpose.
802. Petitions for the adjustment of royalty rates.
803. Membership of the Tribunal.
804. Procedures of the Tribunal.
805. Compensation of members of the Tribunal; expenses of the Tribunal.
806. Reports to the Congress.
807. Effective date of royalty adjustment.
808. Effective date of royalty distribution.
809. Judicial review.

§ 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created in the Library of Congress a Copyright Royalty Tribunal.

(b) Subject to the provisions of this chapter, the purposes of the

Tribunal shall be: (1) to make determinations concerning the adjustment of the copyright royalty rates specified by sections 111, 114, 115, and 116 so as to assure that such rates continue to be reasonable; and (2) to determine in certain circumstances the distribution of the royalty fees deposited with the Register of Copyrights under sections 111, 114, and 116.

§ 802. Petitions for the adjustment of royalty rates

During calendar year 1978, and in each subsequent fifth calendar year, any owner or user of a copyrighted work whose royalty rates are initially specified by sections 111 and 114, or the duly authorized agent of such owner or user, may file a petition with the Register of Copyrights declaring that the petitioner requests an adjustment of the statutory royalty rate, or a rate previously established by the Tribunal. During calendar year 1980, and in each subsequent fifth calendar year, any owner or user of a copyrighted work whose royalty rates are initially specified by sections 115 and 116, or the duly authorized agent of such owner or user, may file a petition with the Register of Copyrights declaring that the petitioner requests an adjustment of the statutory royalty rate, or a rate previously established by the Tribunal. The Register shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Register determines that the petitioner has a significant interest, he shall cause notice of his decision to be published in the Federal Register.

§ 803. Membership of the Tribunal

(a) Upon determining that a petitioner for adjustment of a royalty rate has a significant interest, or upon certifying the existence of a controversy concerning the distribution of royalty fees deposited pursuant to sections 111, 114 and 116, the Register shall request the American Arbitration Association or any similar successor organization to furnish a list of three members of said Association. The Register shall communicate the names together with such information as may be appropriate to all parties of interest. Any such party within twenty days from the date said communication is sent may submit to the Register written objections to any or all of the proposed names. If no such objections are received, or if the Register determines that said objections are not well founded, he shall certify the appointment of the three designated individuals to constitute a panel of the Tribunal for the consideration of the specified rate or royalty distribution. Such panel shall function as the Tribunal established in section 801. If the

Register determines that the objections to the designation of one or more of the proposed individuals are well founded, the Register shall request the American Arbitration Association or any similar successor organization to propose the necessary number of substitute individuals. Upon receiving such additional names the Register shall constitute the panel. The Register shall designate one member of the panel as Chairman.

(b) If any member of a panel becomes unable to perform his duties, the Register, after consultation with the parties, may provide for the selection of a successor in the manner prescribed in subsection (a).

§ 804. Procedures of the Tribunal

(a) The Tribunal shall fix a time and place for its proceedings and shall cause notice to be given to the parties.

(b) Any organization or person entitled to participate in the proceedings may appear directly or be represented by counsel.

(c) Except as otherwise provided by law, the Tribunal shall determine its own procedure. For the purpose of carrying out the provisions of this chapter, the Tribunal may hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documents.

(d) Every final decision of the Tribunal shall be in writing and shall state the reasons therefor.

§ 805. Compensation of members of the Tribunal; expenses of the Tribunal

(a) In proceedings for the distribution of royalty fees, the compensation of members of the Tribunal and other expenses of the Tribunal shall be deducted prior to the distribution of the funds.

(b) In proceedings for the adjustment of royalty rates, there is hereby authorized to be appropriated such sums as may be necessary.

(c) The Library of Congress is authorized to furnish facilities and incidental service to the Tribunal.

(d) The Tribunal is authorized to procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code.

§ 806. Reports to the Congress

The Tribunal immediately upon making a final determination in any proceeding for adjustment of a statutory royalty shall transmit its decision, together with the reasons therefor, to the Secretary of the Senate and the Clerk of the House of Representatives for reference to the Judiciary Committees of the Senate and the House of Representatives.

§ 807. Effective date of royalty adjustment

(a) Prior to the expiration of the first period of ninety calendar days of continuous session of the Congress, following the transmittal of the report specified in section 806, either House of the Congress may adopt a resolution stating in substance that the House does not favor the recommended royalty adjustment, and such adjustment, therefore, shall not become effective.

(b) For the purposes of subsection (a) of this section

(1) Continuity of session shall be considered as broken only by an adjournment of the Congress sine die, and

(2) In the computation of the ninety-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than three days to a day certain.

(c) In the absence of the passage of such a resolution by either House during said ninety-day period, the final determination by the Tribunal of a petition for adjustment shall take effect on the first day following ninety calendar days after the expiration of the period specified by subsection (a).

(d) The Register of Copyrights shall give notice of such effective date by publication in the Federal Register not less than sixty days before said date.

§ 808. Effective date of royalty distribution

A final determination of the Tribunal concerning the distribution of royalty fees deposited with the Register of Copyrights pursuant to sections 111, 114, and 116 shall become effective thirty days following such determination unless prior to that time an application has been filed pursuant to section 809 to vacate, modify or correct the determination, and notice of such application has been served upon the Register of Copyrights. The Register upon the expiration of thirty days shall distribute such royalty fees not subject to any application filed pursuant to section 809.

§ 809. Judicial review

In any of the following cases the United States District Court for the District of Columbia may make an order vacating, modifying or correcting a final determination of the Tribunal concerning the distribution of royalty fees—

(a) Where the determination was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in any member of the panel.

(c) Where any member of the panel was guilty of any misconduct by which the rights of any party have been prejudiced.

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

SEC. 102. This title becomes effective on January 1, 1975, except as otherwise provided by sections 111(c) and 304(b) of title 17 as amended by this title.

SEC. 103. This title does not provide copyright protection for any work that goes into the public domain before January 1, 1975. The exclusive rights, as provided by section 106 of title 17 as amended by this title, to reproduce a work in phonorecords and to distribute phonorecords of the work, do not extend to any nondramatic musical work copyrighted before July 1, 1909.

SEC. 104. All proclamations issued by the President under sections 1(e) or 9(b) of title 17 as it existed on December 31, 1974, or under previous copyright statutes of the United States shall continue in force until terminated, suspended, or revised by the President.

SEC. 105. (a)(1) Section 505 of title 44, United States Code, Supplement IV, is amended to read as follows:

"§ 505. Sale of duplicate plates

"The Public Printer shall sell, under regulations of the Joint Committee on Printing to persons who may apply, additional or duplicate stereotype or electrotype plates from which a Government publication is printed, at a price not to exceed the cost of composition, the metal, and making to the Government, plus 10 per centum, and the full amount of the price shall be paid when the order is filed."

(2) The item relating to section 505 in the sectional analysis at the beginning of chapter 5 of title 44, United States Code, is amended to read as follows:

"505. Sale of duplicate plates."

(b) Section 2113 of title 44, United States Code, is amended to read as follows:

"§ 2113. Limitation on liability

"When letters and other intellectual productions (exclusive of patented material, published works under copyright protection, and unpublished works for which copyright registration has been made) come into the custody or possession of the Administrator of General Services, the United States or its agents are not liable for infringement of copyright or analogous rights arising out of use of the materials for display, inspection, research, reproduction, or other purposes."

(c) In section 1498(b) of title 28 of the United States Code, the phrase "section 101(b) of title 17" is amended to read "section 504(c) of title 17".

(d) Section 543(a)(4) of the Internal Revenue Code of 1954, as amended, is amended by striking out "(other than by reason of section 2 or 6 thereof)".

(e) Section 4152(a) of title 39 of the United States Code is amended by striking out clause (5).

(f) In section 6 of the Standard Reference Data Act (section 290(e) of title 15 of the United States Code, Supplement IV), subsection (a) is amended to delete the reference to "section 8" and to substitute therefor the phrase "section 105".

SEC. 106. In any case where, before January 1, 1975, a person has lawfully made parts of instruments serving to reproduce mechanically a copyrighted work under the compulsory license provisions of section 1(e) of title 17 as it existed on December 31, 1974, he may continue to make and distribute such parts embodying the same mechanical reproduction without obtaining a new compulsory license under the terms of section 115 of title 17 as amended by this title. However, such parts made on or after January 1, 1975, constitute phonorecords and are otherwise subject to the provisions of said section 115.

SEC. 107. In the case of any work in which an ad interim copyright is subsisting or is capable of being secured on December 31, 1974, under section 22 of title 17 as it existed on that date, copyright protection is hereby extended to endure for the term or terms provided by section 304 of title 17 as amended by this title.

SEC. 108. The notice provisions of sections 401 through 403 of title 17 as amended by this title apply to all copies or phonorecords publicly distributed on or after January 1, 1975. However, in the case of a work published before January 1, 1975, compliance with the notice provisions of title 17 either as it existed on December 31, 1974, or as amended by this title, is adequate with respect to copies publicly distributed after December 31, 1974.

SEC. 109. The registration of claims to copyright for which the required deposit, application, and fee were received in the Copyright Office before January 1, 1975, and the recordation of assignments of copyright or other instruments received in the Copyright Office before January 1, 1975, shall be made in accordance with title 17 as it existed on December 31, 1974.

SEC. 110. The demand and penalty provisions of section 14 of title 17 as it existed on December 31, 1974, apply to any work in which copyright has been secured by publication with notice of copyright on or before that date, but any deposit and registration made after that date in response to a demand under that section shall be made in accordance with the provisions of title 17 as amended by this title.

SEC. 111. All causes of action that arose under title 17 before January 1, 1975, shall be governed by title 17 as it existed when the cause of action arose.

SEC. 112. If any provision of title 17, as amended by this title, is declared unconsitituional, the validity of the remainder of the title is not affected.

TITLE II—NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

ESTABLISHMENT AND PURPOSE OF COMMISSION

SEC. 201. (a) There is hereby created in the Library of Congress a National Commission on New Technological Uses of Copyrighted Works (hereafter called the Commission).

(b) The purpose of the Commission is to study and compile data on:

(1) the reproduction and use of copyrighted works of authorship—

(A) in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and

(B) by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities; and

(2) the creation of new works by the application or intervention of such automatic systems or machine reproduction.

(c) The Commission shall make recommendations as to such changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners.

MEMBERSHIP OF THE COMMISSION

SEC. 202. (a) The Commission shall be composed of thirteen voting members, appointed as follows:

(1) Four members, to be appointed by the President, selected from authors and other copyright owners;

(2) Four members, to be appointed by the President, selected from users of copyright works;

(3) Four nongovernmental members to be appointed by the President, selected from the public generally;

(4) The Librarian of Congress.

(b) The President shall appoint a Chairman, and a Vice Chairman who shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office, from among the four members selected from the public generally, as provided by clause (3) of subsection (a). The Register of Copyrights shall serve ex officio as a nonvoting member of the Commission.

(c) Seven voting members of the Commission shall constitute a quorum.

(d) Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner as the original appointment was made.

COMPENSATION OF MEMBERS OF COMMISSIONS

SEC. 203. (a) Members of the Commission, other than officers or employees of the Federal Government, shall receive compensation at the rate of $100 per day while engaged in the actual performance of Commission duties, plus reimbursement for travel, subsistence, and other necessary expenses in connection with such duties.

(b) Any members of the Commission who are officers or employees of the Federal Government shall serve on the Commission without compensation, but such members shall be reimbursed for travel, subsistence, and other necessary expenses in connection with the performance of their duties.

STAFF

SEC. 204. (a) To assist in its studies, the Commission may appoint a staff which shall be an administrative part of the Library of Congress. The staff shall be headed by an Executive Director, who shall be responsible to the Commission for the Administration of the duties entrusted to the staff.

(b) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code, but at rates not to exceed $100 per day.

EXPENSES OF THE COMMISSION

SEC. 205. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

REPORTS

SEC. 206. (a) Within one year after the first meeting of the Commission it shall submit to the President and the Congress a preliminary report on its activities.

(b) Within three years after the enactment of this Act the Commission shall submit to the President and the Congress a final report on its study and investigation which shall include its recommendations and such proposals for legislation and administrative action as may be necessary to carry out its recommendations.

(c) In addition to the preliminary report and final report required by this section, the Commission may publish such interim reports as it may determine, including but not limited to consultant's reports, transcripts of testimony, seminar reports, and other Commission findings.

POWERS OF THE COMMISSION

SEC. 207. (a) The Commission or, with the authorization of the Commission, any three or more of its members, may, for the purpose of carrying out the provisions of this title, hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documentary material.

(b) With the consent of the Commission, any of its members may hold any meetings, seminars, or conferences considered appropriate to provide a forum for discussion of the problems with which it is dealing.

TERMINATION

SEC. 208. On the sixtieth day after the date of the submission of its final report, the Commission shall terminate and all offices and employment under it shall expire.

TITLE III—PROTECTION OF ORNAMENTAL DESIGNS OF USEFUL ARTICLES

DESIGNS PROTECTED

SEC. 301. (a) The author or other proprietor of an original ornamental design of a useful article may secure the protection provided by this title upon complying with and subject to the provisions hereof.

(b) For the purposes of this title—

(1) A "useful article" is an article which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article which normally is a part of a useful article shall be deemed to be a useful article.

(2) The "design of a useful article", hereinafter referred to as a "design", consists of those aspects or elements of the article, including its two-dimensional or three-dimensional features of shape and surface, which make up the appearance of the article.

(3) A design is "ornamental" if it is intended to make the article attractive or distinct in appearance.

(4) A design is "original" if it is the independent creation of an author who did not copy it from another source.

DESIGNS NOT SUBJECT TO PROTECTION

SEC. 302. Protection under this title shall not be available for a design that is—

(a) not original;

(b) staple or commonplace, such as a standard geometric figure, familiar symbol, emblem, or motif, or other shape, pattern, or configuration which has become common, prevalent, or ordinary;

(c) different from a design excluded by subparagraph (b) above only in insignificant details or in elements which are variants commonly used in the relevant trades; or

(d) dictated solely by a utilitarian function of the article that embodies it;

(e) composed of three-dimensional features of shape and surface with respect to men's, women's, and children's apparel, including undergarments and outerwear.

REVISIONS, ADAPTATIONS, AND REARRANGEMENTS

SEC. 303. Protection for a design under this title shall be available notwithstanding the employment in the design of subject matter excluded from protection under section 302, if the design is a substantial revision, adaptation, or rearrangement of said subject matter: *Provided*, That such protection shall be available to a design employing subject matter protected under title I of this Act, or title 35 of the United States Code or this title, only if such protected subject matter is employed with the consent of the proprietor thereof. Such protection shall be independent of any subsisting protection in subject matter employed in the design, and shall not be construed as securing any right to subject matter excluded from protection or as extending any subsisting protection.

COMMENCEMENT OF PROTECTION

SEC. 304. (a) The protection provided for a design under this title shall commence upon the date when the design is first made public.

(b) A design is made public when, by the proprietor of the design or with his consent, an existing useful article embodying the design is anywhere publicly exhibited, publicly distributed, or offered for sale or sold to the public.

TERM OF PROTECTION

SEC. 305. (a) Subject to the provisions of this title, the protection herein provided for a design shall continue for a term of five years from the date of the commencement of protection as provided in section 304(a), but if a proper application for renewal is received by the Administrator during the year prior to the expiration of the five-year term, the protection herein provided shall be extended for an additional period of five years from the date of expiration of the first five years.

(b) If the design notice actually applied shows a date earlier than the date of the commencement of protection as provided in section 304(a), protection shall terminate as though the term had commenced at the earlier date.

(c) Where the distinguishing elements of a design are in substantially the same form in a number of different useful articles, the design shall be protected as to all such articles when protected as to one of them, but not more than one registration shall be required. Upon expiration or termination of protection in a particular design as provided in this title all rights under this title in said design shall terminate, regardless of the number of different articles in which the design may have been utilized during the term of its protection.

THE DESIGN NOTICE

SEC. 306. (a) Whenever any design for which protection is sought under this title is made public as provided in section 304(b), the proprietor shall, subject to the provisions of section 307, mark it or have it marked legibly with a design notice consisting of the following three elements:

(1) the words "Protected Design", the abbreviation "Prot'd Des." or the letter "D" within a circle, thus Ⓓ;

(2) the year of the date on which the design was first made public; and

(3) the name of the proprietor, an abbreviation by which the name can be recognized, or a generally accepted alternative designation of the proprietor; any distinctive identification of the proprietor may be used if it has been approved and recorded by the Administrator before the design marked with such identification is made public.

After registration the registration number may be used instead of the elements specified in (2) and (3) hereof.

(b) The notice shall be so located and applied as to give reasonable notice of design protection while the useful article embodying the design is passing through its normal channels of commerce. This requirement may be fulfilled, in the case of sheetlike or strip materials bearing repetitive or continuous designs, by application of the notice to each repetition, or to the margin, selvage, or reverse side of the material at reasonably frequent intervals, or to tags or labels affixed to the material at such intervals.

(c) When the proprietor of a design has complied with the provisions of this section, protection under this title shall not be affected by the removal, destruction, or obliteration by others of the design notice on an article.

EFFECT OF OMISSION OF NOTICE

SEC. 307. The omission of the notice prescribed in section 306 shall not cause loss of the protection or prevent recovery for infringement against any person who, after written notice of the design protection, begins an undertaking leading to infringement: *Provided*, That such omission shall prevent any recovery under section 322 against a person who began an undertaking leading to infringement before receiving written notice of the design protection, and no injunction shall be had unless the proprietor of the design shall reimburse said person for any reasonable expenditure or contractual obligation in connection with such undertaking incurred before written notice of design protection, as the court in its discretion shall direct. The burden of proving written notice shall be on the proprietor.

INFRINGEMENT

SEC. 308. (a) It shall be infringement of a design protected under this title for any person, without the consent of the proprietor of the design, within the United States or its territories or possessions and during the term of such protection, to—

(1) make, have made, or import, for sale or for use in trade, any infringing article as defined in subsection (d) hereof; or

(2) sell or distribute for sale or for use in trade any such infringing article: *Provided, however*, That a seller or distributor of any such article who did not make or import the same shall be deemed to be an infringer only if—

(i) he induced or acted in collusion with a manufacturer to make, or an importer to import such article (merely purchasing or giving an order to purchase in the ordinary course of business shall not of itself constitute such inducement or collusion); or

(ii) he refuses or fails upon the request of the proprietor of the design to make a prompt and full disclosure of his source of such article, and he orders or reorders such article after having received notice by registered or certified mail of the protection subsisting in the design.

(b) It shall be not infringement to make, have made, import, sell, or distribute, any article embodying a design created without knowledge of, and copying from, a protected design.

(c) A person who incorporates into his own product of manufacture an infringing article acquired from others in the ordinary course of business, or who, without knowledge of the protected design, makes or processes an infringing article for the account of another person in the ordinary course of business, shall not be deemed an infringer except under the conditions of clauses (i) and (ii) of paragraph (a)(2) of this section. Accepting an order or reorder from the source of the infringing article shall be deemed ordering or reordering within the meaning of clause (ii) of paragraph (a)(2) of this section.

(d) An "infringing article" as used herein is any article, the design of which has been copied from the protected design, without the consent of the proprietor: *Provided however*, That an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium shall not be deemed to be an infringing article. An article is not an infringing article if it embodies, in common with the protected design, only elements described in subsections (a) through (d) of section 302.

(e) The party alleging rights in a design in any action or proceeding shall have the burden of affirmatively establishing its originality whenever the opposing party introduces an earlier work which is identical to such design, or so similar as to make a prima facie showing that such design was copied from such work.

APPLICATION FOR REGISTRATION

SEC. 309. (a) Protection under this title shall be lost if application for registration of the design is not made within six months after the date on which the design was first made public as provided in section 304(b).

(b) Application for registration or renewal may be made by the proprietor of the design.

(c) The application for registration shall be made to the Administrator and shall state (1) the name and address of the author or authors of the design; (2) the name and address of the proprietor if different from the author; (3) the specific name of the article, indicating its utility; (4) the date when the design was first made public as provided in section 304(b); and (5) such other information as may be required by the Administrator. The application for registration may include a description setting forth the salient features of the design, but the absence of such a description shall not prevent registration under this title.

(d) The application for registration shall be accompanied by a statement under oath by the applicant or his duly authorized agent or representative, setting forth that, to the best of his knowledge and belief (1) the design is original and was created by the author or authors named in the application; (2) the design has not previously been registered on behalf of the applicant or his predecessor in title; (3) the design has been made public as provided in section 304(b); and (4) the applicant is the person entitled to protection and to registration under this title. If the design has been made public with the design notice prescribed in section 306, the statement shall also describe the exact form and position of the design notice.

(e) Error in any statement or assertion as to the utiliy of the article named in the application, the design of which is sought to be registered, shall not affect the protection secured under this title.

(f) Errors in omitting a joint author or in naming an alleged joint author shall not affect the validity of the registration, or the actual ownership or the protection of the design: *Provided*, That the name of one individual who was in fact an author is stated in the application. Where the design was made within the regular scope of the author's employment and individual authorship of the design is difficult or impossible to ascribe and the application so states, the name and address of the employer for whom the design was made may be stated instead of that of the individual author.

(g) The application for registration shall be accompanied by two copies of a drawing or other pictorial representation of the useful article having one or more views adequate to show the design, in a form and style suitable for reproduction, which shall be deemed a part of the application.

(h) Related useful articles having common design features may be included in the same application under such conditions as may be prescribed by the Administrator.

BENEFIT OF EARLIER FILING DATE IN FOREIGN COUNTRY

SEC. 310. An application for registration of a design filed in this country by any person who has, or whose legal representative or predecessor or successor in title has previously regularly filed an application for registration of the same design in a foreign country which affords similar privileges in the case of applications filed in the United States or to citizens of the United States shall have the same effect as if filed in this country on the date on which the application was first filed in any such foreign country, if the application in this country is filed within six months from the earliest date on which any such foreign application was filed.

OATHS AND ACKNOWLEDGMENTS

SEC. 311. Oaths and acknowledgments required by this title may be made before any person in the United States authorized by law to administer oaths, or, when made in a foreign country, before any diplomatic or consular officer of the United States authorized to administer oaths, or before any official authorized to administer oaths in the foreign country concerned, whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States, and shall be valid if they comply with the laws of the state or country where made.

EXAMINATION OF APPLICATION AND ISSUE OR REFUSAL OF REGISTRATION

SEC. 312 (a) Upon the filing of an application for registration in proper form as provided in section 309, and upon payment of the fee provided in section 315, the Administrator shall determine whether or not the application relates to a design which on its face appears to be subject to protection under this title, and if so, he shall register the design. Registration under this subsection shall be announced by publication.

(b) If, in his judgment, the application for registration relates to a design which on its face is not subject to protection under this title, the Administrator shall send the applicant a notice of his refusal to register and the grounds therefor. Within three months from the date the notice of refusal is sent, the applicant may request, in writing, reconsideration of his application. After consideration of such a request, the Administrator shall either register the design or send the applicant a notice of his final refusal to register.

(c) Any person who believes he is or will be damaged by a registration under this title may, upon payment of the prescribed fee, apply to the Administrator at any time to cancel the registration on the ground that the design is not subject to protection under the provisions of this title, stating the reasons therefor. Upon receipt of an application for cancellation, the Administrator shall send the proprietor of the design, as shown in the records of the Office of the Administrator, a notice of said application, and the proprietor shall have a period of three months from the date such notice was mailed in which to present arguments in support of the validity of the registration. It shall also be within the authority of the Administrator to establish, by regulation, conditions under which the opposing parties may appear and be heard in support of their arguments. If, after the periods provided for the presentation of arguments have expired, the Administrator determines that the applicant for cancellation has established that the design is not subject to protection under the provisions of this title, he shall order the registration stricken from the record. Cancellation under this subsection shall be announced by publication, and notice of the Administrator's final determination with respect to any application for cancellation shall be sent to the applicant and to the proprietor of record.

(d) Remedy against a final adverse determination under subparagraphs (b) and (c) above may be had by means of a civil action against the Administrator pursuant to the provision of section 1361 of title 28, United States Code, if commenced within such time after such decision, not less than 60 days, as the Administrator appoints.

(e) When a design has been registered under this section, the lack of utility of any article in which it has been embodied shall be no defense to an infringement action under section 320, and no ground for cancellation under subsection (c) of this section or under section 323.

CERTIFICATE OF REGISTRATION

SEC. 313. Certificates of registration shall be issued in the name of the United States under the seal of the Office of the Administrator and shall be recorded in the official records of that Office. The certificate shall state the name of the useful article, the date of filing of the application, the date on which the design was first made public as provided in section 304(b) or any earlier date as set forth in section 305(b), and shall contain a reproduction of the drawing or other pictorial representation showing the design. Where a description of the salient features of the design appears in the application, this description shall also appear in the certificate. A renewal certificate shall contain the date of renewal registration in addition to the foregoing. A certificate of initial or renewal registration shall be admitted in any court as prima facie evidence of the facts stated therein.

PUBLICATION OF ANNOUNCEMENTS AND INDEXES

SEC. 314. (a) The Administrator shall publish lists and indexes of registered designs and cancellations thereof and may also publish the drawing or other pictorial representations of registered designs for sale or other distribution.

(b) The Administrator shall establish and maintain a file of the drawings or other pictorial representations of registered designs, which file shall be available for use by the public under such conditions as the Administrator may prescribe.

FEES

SEC. 315. (a) There shall be paid to the Administrator the following fees:

(1) On filing each application for registration or for renewal of registration of a design, $15.

(2) For each additional related article included in one application, $10.

(3) For recording assignment, $3 for the first six pages, and for each additional two pages or less, $1.

(4) For a certificate of correction of an error not the fault of the Office, $10.

(5) For certification of copies of records, $1.

(6) On filing each application for cancellation of a registration, $15.

(b) The Administrator may establish charges for materials or services furnished by the Office, not specified above, reasonably related to the cost thereof.

REGULATIONS

SEC. 316. The Administrator may establish regulations not inconsistent with law for the administration of this title.

COPIES OF RECORDS

SEC. 317. Upon payment of the prescribed fee, any person may obtain a certified copy of any official record of the Office of the Administrator, which copy shall be admissible in evidence with the same effect as the original.

CORRECTION OF ERRORS IN CERTIFICATES

SEC. 318. The Administrator may correct any error in a registration incurred through the fault of the Office, or, upon payment of the required fee, any error of a clerical or typographical nature not the fault of the Office occurring in good faith, by a certificate of correction under seal. Such registration, together with the certificate, shall thereafter have the same effect as if the same had been originally issued in such corrected form.

OWNERSHIP AND TRANSFER

SEC. 319. (a) The property right in a design subject to protection under this title shall vest in the author, the legal representatives of a deceased author or of one under legal incapacity, the employer for whom the author created the design in the case of a design made within the regular scope of the author's employment, or a person to whom the rights of the author or of such employer have been transferred. The person or persons in whom the property right is vested shall be considered the proprietor of the design.

(b) The property right in a registered design, or a design for which an application for registration has been or may be filed, may be assigned, granted, conveyed, or mortgaged by an instrument in writing, signed by the proprietor, or may be bequeathed by will.

(c) An acknowledgment as provided in section 311 shall be prima facie evidence of the execution of an assignment, grant, conveyance, or mortgage.

(d) An assignment, grant, conveyance, or mortgage shall be void as against any subsequent purchaser or mortgage for a valuable consideration, without notice, unless it is recorded in the Office of the Administrator within three months from its date of execution or prior to the date of such subsequent purchase or mortgage.

REMEDY FOR INFRINGEMENT

SEC. 320. (a) The proprietor of a design shall have remedy for infringement by civil action instituted after issuance of a certificate of registration of the design.

(b) The proprietor of a design may have judicial review of a final refusal of the Administrator to register the design, by a civil action brought as for infringement if commenced within the time specified in section 312(d), and shall have remedy for infringement by the same action if the court adjudges the design subject to protection under this title: *Provided*, That (1) he has previously duly filed and duly prosecuted to such final refusal an application in proper form for registration of the designs, and (2) he causes a copy of the complaint in action to be delivered to the Administrator within ten days after the commencement of the action, and (3) the defendant has committed acts in respect to the design which would constitute infringement with respect to a design protected under this title.

INJUNCTION

SEC. 321. The several courts having jurisdiction of actions under this title may grant injunctions in accordance with the principles of equity to prevent infringement, including in their discretion, prompt relief by temporary restraining orders and preliminary injunctions.

RECOVERY FOR INFRINGEMENT, AND SO FORTH

SEC. 322. (a) Upon finding for the claimant the court shall award him damages adequate to compensate for the infringement, but in no event less than the reasonable value the court shall assess them. In either event the court may increase the damages to such amount, not exceeding $5,000 or $1 per copy, whichever is greater, as to the court shall appear to be just. The damages awarded in any of the above circumstances shall constitute compensation and not a penalty. The court may receive expert testimony as an aid to the determination of damages.

(b) No recovery under paragraph (a) shall be had for any infringement committed more than three years prior to the filing of the complaint.

(c) The court may award reasonable attorney's fees to the prevailing party. The court may also award other expenses of suit to a defendant prevailing in an action brought under section 320(b).

(d) The court may order that all infringing articles, and any plates, molds, patterns, models, or other means specifically adapted for making the same be delivered up for destruction or other disposition as the court may direct.

POWER OF COURT OVER REGISTRATION

SEC. 323. In any action involving a design for which protection is sought under this title, the court when appropriate may order registration of a design or the cancellation of a registration. Any such order shall be certified by the court to the Administrator, who shall make appropriate entry upon the records of his Office.

LIABILITY FOR ACTION ON REGISTRATION FRAUDULENTLY OBTAINED

SEC. 324. Any person who shall bring an action for infringement knowing that registration of the design was obtained by a false or fraudulent representation materially affecting the rights under this title, shall be liable in the sum of $1,000, or such part thereof as the court may determine, as compensation to the defendant, to be charged against the plaintiff and paid to the defendant, in addition to such costs and attorney's fees of the defendant as may be assessed by the court.

PENALTY FOR FALSE MARKING

SEC. 325. (a) Whoever, for the purpose of deceiving the public, marks upon, or applies to, or uses in advertising in connection with any article made, used, distributed, or sold by him, the design of which is not protected under this title, a design notice as specified in section 306 or any other words or symbols importing that the design is protected under this title, knowing that the design is not so protected, shall be fined not more than $500 for every such offense.

(b) Any person may sue for the penalty, in which event, one-half shall go to the person suing and the other to the use of the United States.

PENALTY FOR FALSE REPRESENTATION

SEC. 326. Whoever knowingly makes a false representation materially affecting the rights obtainable under this title for the purpose of obtaining registration of a design under this title shall be fined not less than $500 and not more than $1,000, and any rights or privileges he may have in the design under this title shall be forfeited.

RELATION TO COPYRIGHT LAW

SEC. 327. (a) Nothing in this title shall affect any right or remedy now or hereafter held by any person under title I of this Act.

(b) When a pictorial, graphic, or sculptural work in which copyright subsists under title I of this Act is utilized in an original ornamental design of a useful article, by the copyright proprietor or under an express license from him, the design shall be eligible for protection under the provisions of this title.

RELATION TO PATENT LAW

SEC. 328. (a) Nothing in this title shall affect any right or remedy available to or held by any person under title 35 of the United States Code.

(b) The issuance of a design patent for an ornamental design for an article of manufacture under said title 35 shall terminate any protection of the design under this title.

COMMON LAW AND OTHER RIGHTS UNAFFECTED

SEC. 329. Nothing in this title shall annul or limit (1) common law or other rights or remedies, if any, available to or held by any person with respect to a design which has not been made public as provided in section 304(b), or (2) any trademark right or right to be protected against unfair competition.

ADMINISTRATOR

SEC. 330. The Administrator and Office of the Administrator referred to in this title shall be such officer and office as the President may designate.

SEVERABILITY CLAUSE

SEC. 331. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of the title or the application to other persons or circumstances shall not be affected thereby.

AMENDMENT OF OTHER STATUTES

SEC. 332. (a) Subdivision a(2) of section 70 of the Bankruptcy Act of July 1, 1898, as amended (11 U.S.C. 110(a)), is amended by inserting "designs," after "patent rights," and "design registration," after "application for patent,".

(b) Title 28 of the United States Code is amended—

(1) by inserting "designs," after "patents," in the first sentence of section 1338(a);

(2) by inserting ", design," after "patent" in the second sentence of section 1338(a);

(3) by inserting "design," after "copyright," in section 1338(b);

(4) by inserting "and register designs" after "copyrights" in section 1400; and

(5) by revising section 1498(a) to read as follows:

"(a) Whenever a registered design or invention is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

"For the purposes of this section, the use or manufacture of a registered design or an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

"The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States, prior to, in the case of an invention, July 1, 1918, and in the case of a registered design, July 1, 1976.

"A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the registered design or invention by the Government. This section shall not confer a right of action on any registrant or patentee or any assignee of such registrant or patentee with respect to any design created by or invention discovered or invented by a person while in the employment or service of the United States, where the design or invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials, or facilities were used."

TIME OF TAKING EFFECT

SEC. 333. This title shall take effect one year after enactment of this Act.

NO RETROACTIVE EFFECT

SEC. 334. Protection under this title shall not be available for any design that has been made public as provided in section 304(b) prior to the effective date of this title.

SHORT TITLE

SEC. 335. This title may be cited as "The Design Protection Act of 1973."

Mr. BRENNAN. I further request that the statements of all witnesses which are not read in full be printed in full in the body of the record, and that the record remain open until August 10 for the filing of supplementary statements to be printed in the appendix to the record.

Senator MCCLELLAN. The Chair sees no objection to the request; unless there is objection the Chair will so order. What is the date?

Mr. BRENNAN. August 10.

It is desirable, Mr. Chairman, that the transcript be printed during the recess so that it is available.

Senator MCCLELLAN. Does that give everyone plenty of time?

Mr. BRENNAN. It gives them 10 days.

Senator MCCLELLAN. Ten days, an opportunity to add, file additional statements or new statements if they like before we go to press.

Mr. BRENNAN. That will be fine.

Senator MCCLELLAN. On the hearing.

Is that the purpose of it?

Mr. BRENNAN. That is the purpose of it, Mr. Chairman.

Senator MCCLELLAN. I think that would be all right. I see no objection to it.

Mr. BRENNAN. Mr. Chairman, as indicated in the hearing notice, these 2 days of hearings are being conducted under a time limitation. The subcommittee has allocated equal time to the principal representatives of the various points of view on five selected issues. I wish to indicate that time consumed in answering questions from the members of the subcommittee and counsel will not be charged against the time of the witnesses.

Senator MCCLELLAN. What you propose is, if they are given so much time, the Senators or counsel can interrupt them for questioning, that that period of interruption of questioning will not be charged against the time allotted to them.

Mr. BRENNAN. That is correct, Mr. Chairman.

Senator MCCLELLAN. That gives them the full time allotted to them to use for themselves.

Mr. BRENNAN. The subcommittee this morning will consider the issue of library photocopying which relates to sections 107 and 108 of title I of the bill and also title II of the bill.

The first witnesses are on behalf of the Association of Research Libraries, to which 15 minutes has been allocated.

Dr. McCarty, would you identify yourself and your associates for the record?

Dr. MCCARTHY. Thank you, Mr. Brennan.

Mr. Chairman, my name is Stephen McCarthy. My associates are, on my right, William Budington, president of the Association of Research Libraries, and executive director of the John Crerar Library in Chicago. On my left is Mr. Philip Brown, our legal counsel and second to the left is Mr. Howard Rovelstad, chairman of our copyright committee, and director of libraries at the University of Maryland.

Mr. Brown and I have prepared statements. Mr. Budington and Mr. Rovelstad will participate in answering questions if there are any.

Senator MCCLELLAN. Very well.

STATEMENTS OF DR. STEPHEN A. McCARTHY, EXECUTIVE DIRECTOR, ASSOCIATION OF RESEARCH LIBRARIES; AND PHILIP B. BROWN, COUNSEL; ACCOMPANIED BY WILLIAM S. BUDINGTON, PRESIDENT, ASSOCIATION OF RESEARCH LIBRARIES; AND HOWARD ROVELSTAD, CHAIRMAN, ASSOCIATION OF RESEARCH LIBRARIES COPYRIGHT COMMITTEE

Dr. McCarthy. My name is Stephen McCarthy. I am executive director of the Association of Research Libraries, an organization of the principal university and research libraries of the country. We appreciate this opportunity to present the views of the association on copyright revision bill, S. 1361.

Mr. Chairman, the Association of Research Libraries wishes to recommend to the committee an amendment to section 108(d) of S. 1361, in the form in which it was submitted to the staff of the committee during the past week. A copy is attached to this statement.

Senator McClellan. This copy of the proposed amendment will be inserted in the record at this point.

[The information referred to follows:]

Amendment to Copyright Revision Bill, S. 1361

Substitute for section 108(d) the following:

(d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, but only under the following conditions:

(1) The library or archives shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or phonorecord of a similarly small part of any other copyrighted work.

(2) The library or archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it, if the library or archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot readily be obtained from trade sources

(3) The library or archives shall attach to the copy a warning that the work appears to be copyrighted.

and renumber section 108(d)(2) to make it 108(d)(4).

Dr. McCarthy. Thank you, sir.

The purpose of the proposed amendment is to insure by specific legislative language that a customary, long established library service of providing a photocopy for a reader who requests it may be continued without infringement of copyright. Adoption of the amendment would remove the threat of suit against libraries arising out of varying judicial interpretations of what is or is not fair use. At the same time this amendment would assure libraries, which are public service agencies largely supported by public funds, that they can and should employ modern technology and methods in serving their readers. It should be emphasized further that this amendment does not seek to encourage or develop a new service. Instead, it seeks to assure beyond doubt or question the legality of a traditional service which was not challenged for two generations under the 1909 Copyright Law until a suit was brought by the Williams and Wilkins Co. against the National Library of Medicine several years ago.

The opinion of Commissioner Davis of the U.S. Court of Claims in the *Williams* and *Wilkins* case brings into question the fair use doctrine as applied to library photocopying. Despite the several criteria of fair use which have been developed by the courts and which are expressed in section 107 of S. 1361, Commissioner Davis apparently disregarded all criteria except one and focused his attention on the loss of potential income by the copyright proprietor. In view of this opinion it is apparent that fair use can no longer be considered adequate assurance for the continuation of customary library services. In our judgment, the services of libraries to their readers are sufficient importance to society and to the nation as a whole to make it desirable to remove any doubts about the legality of a long established and much used service.

Section 108(d)(1) of S. 1361 requires the user to prove or demonstrate to the library that an unused copy is not available from a trade source. How does the ordinary reader do this? How does the library know that he has done it? How does the library evaluate the evidence? Questions such as these and others will inevitably arise, if 108(d)(1) is permitted to remain unchanged in the copyright revision bill. Observance of its requirements will impose a substantial added burden on libraries and on library users and thus will impede access to information. The reader who is from a distant library seeking to obtain library materials through interlibrary loan will be particularly penalized by section 108(d)(1) since he will not be in a position easily and without substantial loss of time to comply with the requirements of 108(d)(1).

Library support, both locally and at the Federal level is limited. Appropriating bodies, including the Congress, have adopted measures designed to encourage the sharing of library resources. This is consistent with traditional library practices. The revision bill without the amendment we recommend would raise doubts about the continuation of this practice because photocopying has been one of the accepted ways of sharing scarce library resources.

The requirements of the bill in its present form would also add substantially to the expenses of libraries because decisions regarding photocopying requests could only be made by highly qualified personnel.

It may be noted further that the copyright laws of most foreign countries contain a specific provision permitting library photocopying for purposes of personal study and research.

Revision of the copyright law has been under way for a period of years. In that time, copyright proprietors have repeatedly stated that the library photocopying was causing serious financial damages to their enterprises. No evidence to support this contention has been presented. In the absence of evidence, it seems fair to conclude that the only studies which have been made have indicated that if damage exists it's very slight.

For these reasons, the Association of Research Libraries recommends the adoption of the proposed amendment as a means of assuring library users of the continuation of an important service.

Thank you for your attention. Our legal counsel, Mr. Brown, will now discuss briefly some of the legal aspects of library photocopying and the proposed amendment.

Thank you, Mr. Chairman.

Senator McClellan. State very succinctly what you do now, what is the practice you want to continue.

Dr. McCarthy. What we do now, sir, is that many libraries provide a photocopying service. A reader may request a photocopy of pages of a book, of a periodical article or a portion of an article, and this is supplied in a single copy for the individual's personal use. This is done both for a person who is physically present or for one who applies through interlibrary loan.

Senator McClellan. Any charge made for it?

Dr. McCarthy. Simply the copying cost.

Senator McClellan. Actual cost, no profit made?

Dr. McCarthy. The cost of the machine and the paper. That is all.

Senator McClellan. We now have the Library of Congress furnish us copies. We can get copies of documents and articles and materials. I do not think we pay any copyright fee. I do not know how it operates.

Can anyone abuse this right under present practices by getting material and profiting from it, commercializing it in any way without paying the copyright fees?

Dr. McCarthy. Not to my knowledge, sir.

Senator McClellan. Is it the allegation that they get no copyright fee on the one copy that you give to a single customer, single patron. Is that it?

Dr. McCarthy. That is what was alleged in the Williams and Wilkins case, that Williams and Wilkins would have had a certain income if they had been paid each time the National Library of Medicine had copied an article from one of their journals.

Senator McClellan. Well, would you indicate from your experience, observations, how much additional income if you had to pay a copyright fee on each copy that you make for individual patrons, how much it would amount to in an average library?

Could you give us any thought on this?

Dr. McCarthy. That is quite difficult, sir.

Senator McClellan. It will vary, of course.

Dr. McCarthy. Over 50 percent of the material copied is not under copyright at all, and the rest is spread over such a large number of publications and publishers that to reimburse publishers for making the copies would require a very elaborate bookkeeping system. It would actually—a publisher is responsible for the statement—cost dimes to collect pennies.

Senator McClellan. A publisher has made that statement?

Dr. McCarthy. That is right, Mr. Curtis Benjamin formerly of McGraw-Hill.

Senator McClellan. Senator Burdick.

Senator Burdick. Yes.

Your objection is to subsection (1) of 108(d).

Let's give you an example. Suppose I go to the public library at Williston, N. Dak., and I want to get page 50 out of a book on zoology dealing with snakes, and I go to the library and I say I want a copy of page 50 on snakes, and the librarian says to me, I think that is available in the publishing house in New York or at the Library of Congress.

As you read that subsection, if that was available as it says here, to be obtained at normal price, an unused copy cannot be obtained—well, it can be obtained at the Library of Congress or can be obtained in New York—would you construe this section to mean that the library at Williston could not copy that page 50.

Dr. McCarthy. Yes, sir; that is right.

Senator Burdick. That is all.

Senator McClellan. Anything further?

Dr. McCarthy. I would now like Mr. Brown to present his testimony.

Senator McClellan. Mr. Brown.

Mr. Brennan. Mr. Brown, there are 7 minutes remaining.

Mr. Brown. Mr. Chairman, I would like to speak very briefly on certain legal points that have arisen recently.

First, my name is Philip B. Brown. I am a partner in the Washington law firm, Cox, Langford & Brown, and counsel to the Association of Research Libraries.

The major legal development on this subject in recent years, apart from the continuing activity of this bill in Congress, is the court case, Williams & Wilkins against the United States, pending in the Court of Claims.

The report of the Commissioner constituting the first decision of the case was filed in February of 1972. The case has been argued and briefed to the judges of the court, and is awaiting decision by the judges of the court at this time. The Commissioner held that photocopying of entire articles from medical journals by the National Institutes of Medicine at the request of doctors and medical researchers constituted infringement of copyright and he recommended that the court conclude, as a matter of law, that plaintiff is entitled to recover reasonable and entire compensation for infringement of copyright, the exact amount to be determined in later proceedings.

Subject to the outcome of the case now pending before the judges of the court, the main effect of the Commissioner's report on library photocopying is twofold: First, that such photocopying as was involved in the case constitutes a violation of the copyright proprietor's rights under 17 U.S.C., section 1, and, second, that such copying is not protected by the doctrine of fair use. If the Commissioner's report should be adopted by the court, the decision would constitute the first judicial interpretation of the 1909 act as it applies to library photocopying and an interpretation contrary to both the libraries' understanding of the meaning of the 1909 act and to the previously unchallenged longstanding photocopying practices of libraries.

These developments in our opinion underscore the importance of the libraries' request that Congress adopt a specific amendment to section 108(d) of the bill authorizing a library to make a single photocopy of an entire journal article at the request of a user without such a practice constituting an infringement of copyright.

Prior to *Williams & Wilkins* it could be argued that if libraries interpreted the 1909 act to authorize such copying and could point for support to the fact that the publisher had not challenged that interpretation and had even participated in a gentlemen's agreement for a period of years which ratified the libraries' practice, there was no need to give the libraries explicit statutory protection since the revision bill did not take away from libraries any rights which they then enjoyed under the 1909 act. Today, we submit that it is not possible to assert that position, and that the libraries' need for new explicit statutory protection for such photocopying is clear.

The amendment proposed by ALA and ARL, the two library organizations, is essential to permit a library to make a copy of an entire journal article for a user. Such an amendment would be fully consistent with the literal wording of all copyright statutes prior to 1909, and fully consistent with the interpretation placed on the 1909 act by users and publishers alike for about 60 years.

In addition to adopting the specific photocopying amendment, we respectfully submit that Congress should also clarify and endorse the application of the doctrine of fair use to library photocopying practices. This is important both because the doctrine had not previously been judicially applied to library photocopying and because the report of the Commissioner in *Williams & Wilkins*, if allowed to stand, would raise serious doubt whether that doctrine could ever apply to library photocopying of an entire article, at least by most of the major libraries.

The Commissioner determined that the copying involved constituted wholesale copying, apparently simply because of the large number of individual requesters for each of whom the library made a copy, and the Commissioner also referred to the facts that on some occasions, the same requester could receive a second copy at a later date, and that the library furnished a copy of the same article to each of a number of different requesters.

Now, if these facts constitute wholesale copying, sufficient to a court to deny a library the defense of fair use, it would appear that the defense would not be available to any large library, such as any of the major research libraries of this country, simply because the total number of patrons of each of these libraries would be so numerous as to fall within the Commissioner's term "wholesale," and thus go beyond fair use.

In order to restore the application of fair use consistent with the intent of the bills previously considered by this committee in recent years, we believe it is essential that Congress reject the interpretation given to fair use by the Commissioner in the *Williams & Wilkins* case and that Congress further declare that the longstanding practice of libraries of making a single copy of copyrighted material, including an entire journal article, is within the meaning of fair use.

Accordingly, we are requesting two things. First is the specific amendment that Dr. McCarthy referred to in the record, the amendment to section 108(d), and this amendment is proposed by the Association of Research Libraries, and by the American Library Association. The second is some clarification that fair use applies to the normal library practice of making a single photocopy of copyrighted material for a user.

Now, those practices would include making a copy of an entire article or just general photocopying practices of libraries as they have been traditionally employed for users' requests. We submit these are essential to permit libraries to continue to serve the needs of scholars, and as Dr. McCarthy has pointed out, we submit that there is no evidence of damage to publishers resulting from this practice. We believe it is necessary, particularly in view of the present posture of the law on this subject, the posture of the report of the Commissioner in the Court of Claims case, and the fact that the court has not yet decided the case, that if Congress enacts a new law on a subject that the law should be clear and certain so as to avoid ambiguity, and we think that the need for clarity and certainty is underscored by the penalties that are provided in the bill which are sufficiently serious so without clear protection a librarian might very well refuse to make a copy of a journal for a user.

We think that the failure to be free to do that would run the risk of failing to give services to the patrons of libraries, to the great detriment of research and scholarship.

Senator McClellan. Mr. Brown, I note on page 3 you point out that for many years the practice was such, somewhat of a gentlemen's agreement, and you proceeded as you do now and you felt there was no need for protection.

Is that because no claim at that time was being asserted by the copyright holders?

Mr. Brown. That is right, Mr. Chairman. There was no lawsuit brought until the *Williams & Wilkins* suit in very recent years, the one that is still pending and while there was considerable discussion, this had not been the problem.

I might point out that in that connection——

Senator McClellan. When did this—if there was a change in the attitude with respect to this practice of the copyright holders—when did that occur, and how did it develop?

Mr. Brown. Well, I suppose the position of the copyright proprietors as they have testified before this committee on previous bills speaks for itself, but this Court of Claims case is the first legal opposition of which I am aware, and that case has been pending for the past 3 or 4 years. It still is pending.

Senator McClellan. Has any effort been made otherwise to assert a claim against libraries prior to this suit?

Mr. Brown. Not that I know of, but perhaps my colleagues can expound.

Dr. McCarthy. I do not believe so, Senator McClellan, no legal action. There may have been some discussion but no legal action has been taken.

Senator Burdick. Well, this presents some intriguing possibilities, getting back to this Library of Congress thing that is being used.

Well, certainly under this section (d)(1), that would also apply to the Library of Congress, would it not? If the book is found in the Library of Congress and someone asks for a copy of it here on the Hill, would that not be the same condition as the library in Williston, N. Dak.?

Mr. Brown. Yes, sir.

Senator Burdick. In other words, the material I am getting then from the Library of Congress from time to time would be illegally given to me under this act?

Mr. Brown. Unless they meet the requirements of this provision.

Senator Burdick. Well, suppose they say you can get that in New York at the publishing houses. I could not get it then, could I?

Mr. Brown. I do not believe so.

Dr. McCarthy. Not under 108(d)(1).

Senator Burdick. We are constantly getting material from the Library of Congress, and I am sure a lot of it is covered by copyright. This section forecloses that.

Mr. Brown. Yes.

Senator Burdick. Thank you.

One more question. Would you apply this to total works?

You say when you copy a total book that has been under copyright?

Mr. Brown. I do not know of any instance in which the library has any desire or wish to copy a total book. The dispute has centered around whether the library has the right to make a photocopy of a total single article in an issue of a journal such as the medical journals that are involved in this lawsuit, and there, if the library has the right to make a copy of a single article, an entire article, for a user, that meets the normal request. I do not believe there ever is a request for a library to copy an entire issue of a medical journal, because it would normally contain several different articles on several different subjects.

Senator BURDICK. Well, you are dealing now with what happens, what is practical. I am getting to what is possible. We have to think of that, too.

Under your language, and under your contention, could an entire book be copied? Could it be?

Dr. MCCARTHY. No—the second clause of our amendment, Senator Burdick, following page 4 of my statement, reads, the library or archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it, if the library or archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot readily be obtained from trade sources.

Senator BURDICK. Well, that is what you are saying now, in the present act, in the proposal.

Dr. MCCARTHY. It is the distinction between a complete book, sir, and a periodical article.

Senator BURDICK. No. You said—I will read it with you. "The Library or Archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it, if the Library or Archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord cannot be obtained elsewhere" and so forth. That is what the proposal said.

In effect, we will not make a copy if you can obtain it elsewhere.

Dr. MCCARTHY. Item one, sir, sub one in our amendment is in a sense the critical part of it.

Senator BURDICK. Well, you get into a phasey area there of more than a relatively small part of it, et cetera, et cetera.

Dr. MCCARTHY. Yes, sir. Economics operates there. The cost of copying an entire book is more expensive than to purchase it, and the form in which it comes out is less satisfactory to use. Libraries, as they are operating now, do not make copies of complete books.

Senator BURDICK. But the thrust of the proposed amendment, the proposal that we have before us today, you would have no quarrel with that if applied to the total work.

Mr. BROWN. Senator, may I respond to that?

Taking the two paragraphs separately, (d)(1) is talking about a complete article from a journal, and that right is the new, important point that is being requested by this amendment, so that it will be clear that a library can make a single copy of one article in a journal for a user without violating the copyright.

Now, the second paragraph says that if they cannot get the work from trade sources, then they can make a copy of the whole thing, or a small part of it, and there, more than a relatively small part of it, rather, and there the thought is that perhaps fair use would cover a relatively small part of it, and there may not be any need for that being specifically covered, but the whole thing, or more than a relatively small part of it would not necessarily come under the fair use, and therefore should be——

Senator BURDICK. Well, that is what I am saying. (1) of (d) would apply then where you had a substantial part of the book or a total book. You are in agreement on that.

Mr. Brown. (1) of (d) is talking about one article or other contribution to a copyrighted collection or a periodical issue to our proposed amendment. I think that is the confusion.

I was speaking from the amendment.

Senator Burdick. You were saying this idea that you cannot copy where it is available elsewhere, that you would agree that it would apply if it was a total work or a substantial part of a total work.

Mr. Brown. Yes.

Senator Burdick. That is all.

Senator McClellan. Counsel, do you have any questions?

Mr. Brennan. Yes, just one or two question, Mr. Chairman.

Mr. Brown, I would like to come back to Senator Burdick's illustration about a copy of a single page on snakes. You responded to that solely in terms of section 108 of the bill.

Would you answer Senator Burdick's question taking the bill as a whole, including section 107 and this subcommittee's interpretation of fair use?

Mr. Brown. I would say that apart from what change is in the process of being made in the concept of fair use by pending court cases which we must always except out because this process is going on independently, that would probably be held to be a proper activity within fair use under 107.

Mr. Brennan. So your answer to Senator Burdick, then, is yes, it could do what he indicated.

Mr. Brown. I would say probably, Senator, but please bear in mind that fair use is a defense meaning that if somebody comes and sues you for doing it, you are then entitled to raise a defense to show that you were within the law in what you did. We still face the problem of interpretation on the part of the librarian who has to decide whether what he is doing is so totally, clearly all right that he is not going to be sued, or if he is sued, that he can afford to defend, and that defense will probably help him win it.

Senator McClellan. In other words, you think that the fair use requirement is something that you cannot determine, the librarian cannot determine whether he comes within the purview of fair use when he performs or makes available copies, that he is always subject to maybe making a mistake that would make him liable?

Mr. Brown. That is right, Mr. Chairman.

Senator McClellan. You do not know how to interpret fair use in every instance.

Mr. Brown. I would think, Mr. Chairman, in view of the fact that it has been the subject that has been given considerable consideration by this committee for some time, and still is, that the librarian would consult counsel and would ask if can you do this, and they might establish some kind of ground rules as to what they think they can or cannot do, but he would not have a clear answer without legal advice.

Senator McClellan. I guess you also agree that it is very difficult, the whole subject is very complex, and it is most difficult to provide even by rules, regulation, or even by statute, clarification about which there could not be different interpretations.

Mr. Brown. That is right, Mr. Chairman.

Senator McClellan. It is very difficult, it seems to me.

Mr. Brown. It is in very large measure, for that reason, that we stress the great need of libraries to help clear that.

Senator McCLELLAN. But we have to go as far as we can toward making it certain, as far as what we can do and we cannot do.

Mr. BROWN. Yes, sir. It is an important that the bill go as far as it can to make it clear and certain that libraries can make a single photocopy of an entire journal article, for example, or of small portions of works for users as they have always done.

[The prepared statements of Stephen A. McCarthy and Philip B. Brown on behalf of the Association of Research Libraries follow:]

STATEMENT OF STEPHEN A. MCCARTHY, EXECUTIVE DIRECTOR, ASSOCIATION OF RESEARCH LIBRARIES

Mr. Chairman, my name is Stephen McCarthy. I am Executive Director of the Association of Research Libraries, an organization of the principal university and research libraries of the country. We appreciate this opportunity to present the views of the Association on the Copyright Revision Bill, S. 1361, and we ask that this statement be made part of the official record.

Mr. Chairman, the Association of Research Libraries wishes to recommend to the Committee an amendment to section 108(d) of S. 1361, in the form in which it was submitted to the staff of the Committee during the past week. A copy is attached to this statement.

Mr. Chairman and members of the Committee, the purpose of the proposed amendment is to ensure by specific legislative language that a customary, long established library service of providing a photocopy for a reader who requests it may be continued without infringement of copyright. Adoption of the amendment would remove the threat of suit against libraries arising out of varying judicial interpretations of what is or is not "fair use." At the same time this amendment would assure libraries, which are public service agencies largely supported by public funds, that they can and should employ modern technology and methods in serving their readers. It should be emphasized further that this amendment does not seek to encourage or develop a new service. Instead it seeks to assure beyond doubt or question the legality of a traditional service which was not challenged for two generations under the 1909 Copyright Law until a suit was brought by the Williams and Wilkins Company against the National Library of Medicine several years ago.

The opinion of Commissioner Davis of the U. S. Court of Claims in the Williams and Wilkins case brings into question the fair use doctrine as applied to library photocopying. Despite the several criteria of fair use which have been developed by the courts and which are expressed in section 107 of S. 1361, Commissioner Davis apparently disregarded all criteria except one and focused his attention on the loss of potential income by the copyright proprietor. In view of this opinion it is apparent that fair use can no longer be considered adequate assurance for the continuation of customery library services. At best, fair use is a defense in case of a suit. The services of libraries to their readers are of sufficient importance to society and to the nation as a whole to make it desirable to remove any doubts about the legality of a long established and much used service.

Section 108(d)(1) of S. 1361 requires the user to prove or demonstrate to the library that an unused copy is not available from a trade source. How does the ordinary reader do this? How does the library know that he has done it? How does the library evaluate the evidence? Questions such as these and others will inevitably arise, if 108(d)(1) is permitted to remain unchanged in the copyright revision bill. Observance of its requirements will impose a substantial added burden on libraries and on library users and thus will impede access to information. At the very least, this requirement will cause delays and hang-ups in service, at a time when the pressure for prompt service is very great.

While it is true that section 108(d)(1) may not affect the library user who is physically present in the library because he can make a copy for himself on a self-operated copying machine, it will impose a serious handicap on a reader from a distant library who is seeking to obtain library materials through interlibrary loan. This reader will be dependent on the staff of the library from which the loan is requested. The requirements placed on the reader and the library by this section would be in many cases result in denial of the request because compliance with the request might constitute an infringement of copyright and be subject to a suit for damages. It is clear that 108(d)(1) would thus have the effect of penalizing the user who does not have direct, personal, physical access to a large comprehensive library. The number of library users who do not have such access is substantial.

Library support both locally and at the federal level is limited. Appropriate bodies, including the Congress, adopted measures designed to encourage the sharing of library resoucres. This is consistent with traditional library practices. The Revision Bill without the amendment we recommend would raise doubts about the continuation of this practice because photocopying has been one of the accepted ways of sharing scarce library resources.

The requirements of the Bill in its present form would also add substantially to the expenses of libraries because decisions regarding photocopy requests could only be made by highly qualified personnel.

It may be noted further that the copyright laws of most foreign countries contain a specific provision permitting library photocopying for purposes of personal study and research.

I would emphasize that the amendment we recommend refers to a single, i.e., one, photocopy; it applies to one article or item in a periodical, not to the whole issue; and it applies to a complete work, i.e., a book, only if the work is no longer available in book stores.

This amendment does *not* seek to legalize multiple copying. Libraries are *not* trying to become publishers; libraries do *not* wish to photocopy best sellers or complete issues of periodicals.

Revision of the copyright law has been underway for a period of years. In that time, copyright proprietors have repeatedly stated that library photocopying was causing serious financial damages to their enterprises. No evidence to support this contention has been presented. In the absence of evidence, it seems fair to conclude that the damage is not as serious as has been alleged.

For these reasons, the Association of Research Libraries recommends the adoption of the proposed amendment as a means of assuring library users of the continuation of an important service.

Thank you for your attention. Our legal counsel, Mr. Brown, will now discuss briefly some of the legal aspects of library photocopying and the proposed amendment.

Amendment to Copyright Revision Bill, S. 1361

Substitute for section 108(d) the following:

(d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial graphic or sculptural work, or a motion picture or other audiovisual work, made at the request of a user of the collections of the library or archives, including a user who makes his request through another library or archives, but only under the following conditions:

> (1) The library or archives shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or phonorecord of a similarly small part of any other copyrighted work.
>
> (2) The library or archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it, if the library or archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot readily be obtained from trade sources.
>
> (3) The library or archives shall attach to the copy a warning that the work appears to be copyrighted.

and renumber section 108(d)(2) to make it 108(d)(4).

Statement of Philip B. Brown, Attorney for the Association of Research Libraries

Mr. Chairman, members of the Committee, my name is Philip B. Brown. I am a partner in the Washington law firm Cox, Langford & Brown, counsel to the Association of Research Libraries. I appreciate this opportunity to appear before you with the President and Executive Director of ARL and the Chairman of its Copyright Committee. My statement supplements that of Dr. McCarthy with emphasis on recent legal developments bearing on the status of library photocopying under existing law and under the pending bill.

The major legal development on this subject in recent years is, of course, the case *Williams & Wilkins* v. *The United States*, pending before the judges of the Court of Claims following a report of the Commissioner filed on February 16,

1972. The case has been briefed and argued to the Court and is awaiting decision. The Commissioner held that the photocopying of entire articles from medical journals by the National Institutes of Health and the National Library of Medicine at the request of doctors and medical researchers constituted infringement of copyright and he recommended that the Court conclude, as a matter of law, that plaintiff is entitled to recover reasonable and entire compensation for infringement of copyright, the amount to be determined in further proceedings.

Subject to the pending decision of the Court, the main effect of the Commissioner's report on library photocopying is twofold, first to rule that such photocopying as was involved in the case constitutes a violation of the copyright proprietor's rights under 17 U.S.C. § 1, and, secondly, to rule that such copying is not protected by the doctrine of "fair use." If the Commissioner's report should be adopted by the Court, the decision would constitute the first judicial interpretation of the 1909 Act as it applies to library photocopying and an interpretation contrary to both the libraries' understanding of the meaning of the 1909 Act and to the previously unchallenged long-standing photocopying practices of libraries.

These new developments underscore the importance of the libraries' request that Congress adopt a specific amendment to Section 108(d) of the pending Copyright Revision Bill authorizing a library to make a single photocopy of an entire journal article at the request of a user without such a practice constituting an infringement of copyright. Prior to *Williams & Wilkins* it could be argued that if libraries interpreted the 1909 Act to authorize such copying and could point for support to the fact that the publishers had not challenged that interpretation and had even participated in a Gentlemen's Agreement for a period of years which ratified the libraries' practice, there was no need to give the libraries explicit statutory protection on this point since the revision bill did not take away from libraries any rights which they then enjoyed under the 1909 Act. Today, it is no longer possible to assert that position, and the libraries' need for explicit statutory protection for such photocopying is clear.

The amendment to Section 108(d) proposed by the American Library Association and endorsed by the Association of Research Libraries is essential to permit a library to make a copy of an entire journal article for a user. Such an amendment would be fully consistent with the literal wording of all copyright statutes prior to 1909 and fully consistent with the interpretation placed on the 1909 Act by users and publishers alike for a period of 60 years.

In addition to adopting the specific photocopying amendment, we respectfully submit that Congress should also clarify and endorse the application of the doctrine of fair use to library photocopying practices. This is important both because the doctrine had not previously been judicially applied to library photocopying and because the report of the Commissioner in *Williams & Wilkins*, if allowed to stand, would raise serious doubt whether the doctrine could ever apply to library photocopying of an entire article. The Commissioner determined that the copying involved in NIH and NLM constituted "wholesale" copying, apparently simply because of the large number of individual requesters for each of whom the library made a copy. The Commissioner also referred to the facts that, on rare occasions, the same requester received a second copy at a later date and that the library furnished a copy of the same article to a number of different requesters. If these facts constitute "wholesale" copying, sufficient to deny a library the defense of fair use, it would appear that the defense would not be available to any large library, such as any of the major research libraries of this country, simply because the total number of patrons of each of these libraries would be so numerous as to fall within the Commissioner's term "wholesale," and thus go beyond his interpretation of fair use.

In order to restore the application of fair use to library photocopying consistent with the intent of the bills considered by this Committee over recent years, it is essential that Congress reject the interpretation given to fair use by the Commissioner in the *Williams & Wilkins* case and that Congress further declare that the long-standing practice of libraries of making a single copy of copyrighted material, including an entire journal article, is within the meaning of fair use in this bill.

Accordingly, there are two changes in the bill which libraries are requesting of this Committee: The first is the specific amendment to Section 108(d) proposed by ALA and ARL. The second is clarification that fair use applies to the normal library practice of making a single photocopy of copyrighted material, including an entire journal article, for a user.

We respectfully submit that these protections are essential to permit libraries to continue to serve the needs of scholars and to make appropriate use of existing technological aids in doing so. We submit that there is no evidence of damage to publishers resulting from this practice and that, in fact, the practice promotes subscriptions to journals rather than replacing them. There is certainly no evidence that this practice is driving publishers out of business. Library photocopying deserves continuing protection from Congress. In view of the uncertain state of the law resulting from the Commissioner's report in *Williams & Wilkins*, the statutory protection should be clear and certain.

The need for clarity and certainty is underscored by the fact that, without the protection of the proposed amendment to Section 108(d), a librarian could well be liable for the extensive damages provided for in Section 504 of the bill. The sentence in Section 504(c)(2) which allows the librarian to prove that "he believed and had reasonable grounds for believing that the reproduction was a fair use under Section 107 . . ." is rendered virtually meaningless by the report of the Commissioner in *Williams & Wilkins*. Without the proposed amendment to the bill, the librarian would undoubtedly refuse to run the risk of rendering the service to the patron—to the great detriment of research and scholarship.

Senator McClellan. Thank you very much.

Call the next witness.

Mr. Brennan. The next witnesses are on behalf of the American Library Association, Dr. Edmon Low.

Fifteen minutes have been given to the American Library Association.

Dr. Low, would you identify yourself and counsel for the record, please?

Dr. Low. I am Edmon Low, librarian of New College in Sarasota, Fla., and am chairman of the Copyright Subcommittee of the American Library Association, and with your permission I have asked Mr. North, who is our counsel for ALA, to sit with me to help on any legal problems.

Senator McClellan. Very well.

Dr. Low. In the interest of saving time, and because my statement duplicates to some extent what has been read, I thought it might be better for me to just emphasize a few points that have not been covered and submit my statement for the record.

Senator McClellan. Yes. Your statement will be printed in full in the record.

Now, you may highlight it or supplement it anyway you like.

STATEMENT OF DR. EDMON LOW, LIBRARIAN OF NEW COLLEGE, SARASOTA, FLA., AND CHAIRMAN, COPYRIGHT SUBCOMMITTEE OF THE AMERICAN LIBRARY ASSOCIATION, ACCOMPANIED BY WILLIAM D. NORTH, ESQ., COUNSEL

Dr. Low. The first observation I have to make is that copyright is not a constitutional right. This is often not understood, certainly understood by attorneys, but often not by the public. It is not a constitutional right. It is a statutory right, one created by law, and which can be changed by law. That is, the rights are granted by the copyright law as it is written, so in revision of the copyright law, you can either enlarge these rights or restrict them or change them in any way or abolish them altogether in your Congress here assembled. It is a statutory right.

Consequently, as I see it, the problem of the committee is to balance the need of protection for the copyright owners to insure them a reasonable return for their efforts and for their expenses of publication and so on, and at the same time, to protect the public good and the right of the public for proper dissemination of publications, which is the area in which libraries are engaged.

There is no collection that contains nearly all the materials which are available, even our Library of Congress, probably the largest library in the world. There are many thousands of titles in the United States that are not in the Library of Congress, and even the smallest libraries often have titles that are not found anywhere else, and this is just for titles in the United States, without considering titles all over the world.

So, in research it is very desirable to have as free a dissemination of information as we can, a listing of what is available, both periodical articles and monographs, and the ability to exchange the information in the most propitious manner.

I happen to be librarian of New College at Sarasota, Fla. I have been director of a university library for many years at one time, and then taught at the University of Michigan and have retired there, and am now finishing my career as the librarian of a small but very fine college down in Florida. I like the small colleges. I think they do very fine work, and my college is typical of the many small schools that are found over the country. Of some 2,500 accredited institutions of higher education in the United States, over 2,000 of these are smaller schools such as my college and would correspond somewhat to Hendrix College in your State, Senator, or College of the Ozarks at Clarksville, or Ouachita Baptist at Arkadelphia, or Jamestown College in North Dakota, and also the community colleges are small but very thriving schools. None of these can have the great library collections. So we have faculty that need to keep up their work and research in order to keep up their quality of teaching, and these faculty, among others, supply articles for the journals which eventually are copyrighted and published.

So it is very important to the smaller library, both the public library which Senator Burdick mentioned and the smaller college library to be able to borrow from the larger libraries as we borrow at times from the University of Florida at Gainesville or Hendrix would borrow from the University of Arkansas at Fayetteville, or even sometimes going more widely where needed esoteric journals cannot be found close by.

So, it is extremely important that we are able to continue this work. And we do not lend much material because our libraries are not large enough. We are the borrowing end, and libraries represented by Mr. McCarthy's group here, are the ones who lend to us, and they are the ones that would be threatened by the law if they went ahead copying for us.

Inter-library loan increase random requests and it is often not recognized that this type of loan increases the subscriptions often as well as is sometimes represented, although I have not had that experience, of discontinuing a periodical because something could be secured on inter-library loans.

For instance, at my school we will, if we borrow as much as two articles from a periodical during a year, try to put that periodical on the subscription list the next year. We feel that if we never request an article from a periodical, obviously we have not damaged its sales. If we have just requested one article over a period of a year, we have not damaged its sales. We spend every bit of money that we can possibly afford for periodical subscriptions, and that is true everywhere. Librarians would always rather have a periodical in hand than to have to borrow it.

So, if copying were restricted, it would not result in a larger periodical list for us or for these other libraries. It would simply mean that we could not help in maintaining the quality of education and quality of teaching and research that we are now able to maintain.

The inter-library loan is one of two groups of copying. The other is referred to as in-house copying, which is done by libraries, generally, but which is the less important of the two because in in-house copying, your material is there and available, but in the inter-library loan, it it not. The material is not there, and this is the only practical means of approaching this.

We are recommending the same amendment that was recommended by the Association of College and Research Libraries. That is, we wish to make a copy of a periodical article where needed, or a small portion of other copyrighted work.

Now, in this we are not wanting to go beyond fair use. The librarians have been accused at different times of having fair use and now they want to go beyond this and do something that is illegal. We are not wanting to go beyond fair use. We are wanting by this amendment to state definitely what fair use is. That is so we can know and not be subject to suits.

Now, we do not think that there would be suits expecting to make any money off librarians, because we do not have any, at least I have not found librarians that have, but we could be subjected to very harrassing suits since larger sums of money can be sued for under statutory damages.

So we would like to have the librarian free of this threat of suit which he cannot be under the fair use that was described here a few minutes ago, because he cannot be sure in any case that he has a right to make a given copy until it has been determined by the court.

So we are searching for this precise definition of what would be reasonable fair use.

Lastly, I should emphasize that I am sure that I speak for all librarians, that we are law abiding citizens, and we are going to abide by whatever law is ultimately passed, both in letter and in spirit. So if a law is passed which is too restrictive it means that we cannot do our jobs as well as we could otherwise. These are the points that are included with one or two additions here to my written statement, and I do appreciate this opportunity to appear before you this morning.

Senator McClellan. Dr. Low, you support the amendment that is offered by Dr. McCarthy?

Dr. Low. Yes, sir.

I wish to submit this amendment.

Senator McClellan. It is attached to your statement. It is already in the record.

Dr. Low. Yes, sir.

Senator McClellan. One question.

What you are saying, as I understand you, you are not opposing fair use. You are seeking a definition in the law of what is within the limits of fair use.

Dr. Low. That is right, sir.

Senator McClellan. Senator Burdick.

Senator Burdick. Well, I want to thank you for your testimony. I note that you say that you would like to be sure of where you are. I think that is the word you used, but as I listened to Dr. McCarthy and listened to you, we are in a very fuzzy area, no matter what we do.

For example, in your amendment, part 2 of what Mr. McCarthy presented, let me read it with you.

> The library or archives shall be entitled to supply a copy or phonerecord of an entire work, or of more than a relatively small part of it.

Well, that could be, a relatively small part could be debatable, but let's go beyond that,

> If the library or archives has first determined on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot readily be obtained from trade sources.

Now, you tell me what is a reasonable investigation?

Dr. Low. I realize that is——

Senator BURDICK. That has the same failings as the language that you are complaining about.

Dr. Low. We do not anticipate that there would be a problem in interpreting that. This is put in because in the copyright law, when you grant exclusive right to the author to the copyright proprietor, this is a monopoly, but there is no restriction on this monopoly as in most monopolies that are granted. There is no requirement for the publisher to keep things in print. If you grant a monopoly to a telephone company to serve in your city, then it is not only regulated, but you demand them to give service, so if you granted a franchise for 25 years, and then after 2 or 3 years it said, it is not profitable, so we are going to discontinue our telephone service, but we will not give up the franchise. Well, then we would not put up with that for a moment, but we do give an exclusive right to the copyright proprietor, to the publisher to publish without any requirement that he keep the book in print, and most books go out of print in the first three years after being printed.

So this is an effort, if we find that it is not in print, is not available from the usual trade sources, because even if it is not in print, sometimes it is available through second hand houses, but that is just a general search that maybe they will have it and so on, but if we cannot find it, and it is not available from the usual publisher, then we want the authority to make another copy of this, if it is needed.

Senator BURDICK. Yes, but to use your language, you want to be sure.

Now, I come in to get a copy of a particular work. What do you have to do as a librarian up in Williston, N. Dak., again, to make a reasonable investigation?

Do you have to make a lot of phone calls, write a lot of letters, or what do you have to do?

Dr. Low. There is a publication that is widely distributed—nearly every library has it—entitled "Books in Print," and this is the list of books that the publishers have in print. It is put out every year at a given time. We would look in that first, and if it is not listed in there, we would look also in the Cumulative Book Index. We would assume then, if it was not listed in these, that it is not available in the convenient trade sources.

Now, this is an area here that we have been able, I think, to come to general agreement with the publishers that this would probably be all right. We have not come to any firm agreement, but we have explored various ways of getting together and doing away with our differences. I think that we could get some agreement on reproducing things that are not in print.

This does become more important in light of the provision in the revision bill which extends the time of copyright. Now, the further you extend the time of copyright, the larger the percentage of material that will be out of print but is still covered by copyright.

Senator BURDICK. Well, then, you think this catalog that is put out indicating when books are published, and so forth, would be adequate if you would thumb through that catalog to see whether or not it is available?

Dr. LOW. That, I think, adequate; yes, sir.

Senator BURDICK. Even though it may be available outside of information in the catalog.

Dr. LOW. It might be, but I said, we might also check the Cumulative Book Index, which is another very general listing, even more general than the books in print.

Senator BURDICK. Do small libraries in small towns have this service?

Dr. LOW. Yes, sir. Practically every library buys these. These are just for ordering your books, you see. You need this because, if you order a book, you have to find out who publishes it unless you are going to a dealer.

Senator BURDICK. I just want to point out that it is complex and it is hard to be absolutely certain when you draw a piece of legislation.

Dr. LOW. It is, and I suppose I am overstating it to say that the amendment we propose would make it absolutely certain. We think that it would be of so much help in determining where we stand that it would be very desirable.

Senator BURDICK. Thank you.

Senator MCCLELLAN. Both you and the publishers are reaching some accommodation. Have they agreed to your amendment?

Dr. LOW. No, sir, they have not.

Senator MCCLELLAN. Well, I thank you.

[The prepared statement of Dr. Edmon Low on behalf of the American Library Association follows:]

STATEMENT OF EDMON LOW, CHAIRMAN, COPYRIGHT SUBCOMMITTEE, AMERICAN LIBRARY ASSOCIATION

I am Edmon Low, director of the Library of New College, Sarastota, Florida, and chairman, Copyright Subcommittee of the American Library Association, a nonprofit, educational organization founded in 1876. Its membership includes some 30,000 librarians, trustees and other public-spirited citizens dedicated to the development of libraries as essential factors in the continued educational, economic, scientific and cultural advancement of the American people. The Association is concerned with the development of all types of libraries—public libraries; school and college and university libraries; medical and law libraries and other specialized libraries—and with the problems they encounter, such as financing, relations with their patrons, and the legal provisions under which they operate, including copyright.

We are concerned here today with the Copyright Revision Bill, S. 1361, and primarily with the provisions relating to photocopying in libraries. This is a subject of great concern to all librarians and to the patrons whom they serve—the general user of the public library, the student, the scholar, the research man, the lawyer, doctor, minister or other professional individual, or to the Congressman himself, as he frequently turns to our great Congressional Library for aid in his important work.

This copying may be roughly divided into two groups, the first being that done either by a member of a library staff or by the user himself from material in the library for immediate use on the premises or nearby; the second, that done by one library for and at the request of another library, often some distance away, for use by one of its patrons there. The first is often designated "in-house" copy-

ing, while the second we usually refer to as "inter-library loan." The first is often
only a convenience to the patron, as for instance a student writing a term paper,
in that he does have the material in hand and could use it on the premises; the
second is basically the more important in that the scholar or other user does not
have the document in hand and therefore it is his only practical access to what
may be highly important material for information or research.

It is now generally understood that a single collection of books or other re-
corded forms of thought as represented by a library can contain only a fraction of
the total amount of material in existence. Even the Library of Congress, pos-
sibly the largest single collection of materials in the world, does not have many
thousands of titles which exist in the United States, to say nothing of those else-
where in the world, while on the other hand even a relatively small library will
often have titles not found anywhere else in the country. The location and cata-
loging of these titles, and of articles in journals, and the making of same available
readily through photocopying or loan—the dissemination of knowledge—is
indispensable to education and research and often involves the reproduction by
photocopying of a portion of a monograph or a journal article protected by
copyright.

It should be noted that copyright is not an inherent right such as trial by
jury of one's peers. It is a statutory right—one created by law—and may be
changed, enlarged, narrowed, or abolished altogether by the Congress here as-
sembled. It is a law enacted not for the benefit of an individual or a corporation
but for the public good and with the purpose, as the Constitution expresses it
"to encourage progress in science and the useful arts." Consequently, in consider-
ing revision the problem becomes one of providing protection to the author
or publisher to provide reasonable return on the investment of time and money,
and at the same time to provide for the widest possible access to and dissemina-
tion of information to the public.

At present I am Director of the New College Library at Sarasota, Florida. New
College is a small, but very fine, private college and its problems in this con-
nection are typical of the two thousand small and medium-sized colleges through-
out the country. While our library is liberally supported and spends every cent
it can afford on serial subscriptions, we cannot possibly have the large resources
of a university like the one at Gainesville or at Tallahassee. Yet our faculty
members, if they maintain a good quality of teaching and do the research which
contributes to it, must have access by random photocopying at times to the larger
collections in the State and elsewhere.

It is usually not known that the inter-library loan arrangement often encour-
ages the entering of additional subscriptions by the library rather than reduc-
ing the number as is often charged. It is a truism that a librarian would rather
have a title at hand rather than to have to borrow even under the most con-
venient circumstances. Consequenlty, when the time comes around each year to
consider the serials list of subscriptions, the record of inter-library loans is
scanned and titles are included from which articles have been requested with
some frequency during the year. In our library the number is two; if we have
had two or more requests for articles from the same title during the year, we
enter a subscription. This not only indicates how the procedure can help the
periodical publishers but also indicates that if only one article or none was copied
from a title during a year, the journal could not have been damaged materially
in the process. It is not only the small schools which would suffer if such photo-
copying were eliminated, however; the scholars at Illinois or Cornell would also
be severely put to it to continue their research in the same way and it is these
scholars which account for the major writing for the scholarly journals. The jour-
nals themeslves, therefore, have a stake in seeing this procedure continued in a
reasonable way.

Courts have long recognized that some reproduction of portions of a copyrighted
work for purposes of criticism, teaching, scholarship or research is desirable and
this judicial concept, known as "fair use," is incorporated in Section 107 of the
revision bill. Libraries have operated all these years under this principle but it
does lack the assurance of freedom of liability from harassing suits which the
librarian needs in his work. This fair use concept necessarily is expressed in
general language in the bill so a librarian will not be able to be sure, until a
court decides a particular case, whether his action, undertaken with the best of
intentions to aid the patron, is or is not an infringement. Fair use, then, is really
not right to copy any given thing, but only a defense to be invoked if one is sued.
This threat of suit, even if one is able to maintain his innocence in court, is
very real because suits are costly in proportion to the amount for which one is
sued. This revision bill provides not only for demand for actual damages but also

one can be sued for statutory damages up to a limit of $50,000 for each imagined infringement.

This threat has now become much greater by the recommendation of Commissioner Davis in the Williams and Wilkins case now under appeal in the U.S. Court of Claims. In this he says "While it may be difficult (if not impossible) to determine the number of sales lost to photocopying, the fact remains that each photocopy user is a potential subscriber or at least is a potential source of royalty income for licensed copying."[1] Also, "Plaintiff need not prove actual damages to make out its case for infringement."[1] Since any copying may be viewed as potential income, and since no actual damages have to be proved, this recommendation seems to indicate that *any* photocopying is an infringement and that there is no longer any fair use except in some very limited instances mentioned later in the report.

In light of the above, we feel that librarians greatly need some further protection than that offered by fair use in Section 107. We need a definite statement in the law that making a single copy to aid in teaching and research, and particularly in inter-library loan, is permissible and not subject to possible suit for this activity in behalf of the public good. To my knowledge, it has not been shown anywhere that this activity is harmful to the copyright proprietor and, as detailed above, may be of definite help to him.

In light of the above, we wish to request that the attached amendment be substituted for Section 108(d) in S. 1361. We believe this will provide the protection needed by librarians in their efforts to serve their various publics while allowing equally good protection to the owners of copyright.

In conclusion, may I say that I think I speak for all librarians that we intend to faithfully observe the provisions of whatever law is finally passed, both in letter and in spirit, but an unduly restrictive law will make it impossible to serve the people of this country and aid in teaching and research to the maximum extent which is desirable for all.

It has been a pleasure to appear before you today and we appreciate your genuine interest in the problems which copyright presents to libraries.

AMENDMENT TO COPYRIGHT REVISION BILL, S. 1361

Substitute for section 108(d) the following:

(d) The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work, made at the request of a user of the collections of the library or achives, including a user who makes his request through another library or archives, but only under the following conditions:

(1) The library or archives shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or phonorecord of a similarly small part of any other copyrighted work.

(2) The library or archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it, if the library or archives has first determined, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot readily be obtained from trade sources.

(3) The librarly or archives shall attach to the copy a warning that the work appears to be copyrighted.

and renumber section 108(d)(2) to make it 108(d)(4).

Mr. BRENNAN. The next witness is on behalf of the Special Libraries Association. Dr. McKenna. You have been allocated 5 minutes.

Senator McCLELLAN. All right, Doctor, have a seat.

Do you have a statement you wish to place in the record?

Dr. McKENNA. Yes, I have, sir.

Mr. Jack Ellenberger is with me. He is chairman of the association's copyright committee, in the event that you have any questions that I am not able to answer.

Senator McCLELLAN. All right. You may proceed sir.

Your statement will be printed in the record.

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[1] U.S. Court of Claims. The *Williams & Wilkins Company* v. *the United States*. Report of the Commissioner to the Court, February 16, 1972, pp. 16–17.

STATEMENT OF DR. FRANK E. McKENNA, EXECUTIVE DIRECTOR, SPECIAL LIBRARIES ASSOCIATION; ACCOMPANIED BY J. S. ELLENBERGER, LIBRARIAN, COVINGTON & BURLING, AND CHAIRMAN OF THE SPECIAL LIBRARIES ASSOCIATION COPYRIGHT COMMITTEE

Dr. McKENNA. I wish to present the position of the Special Libraries Association with respect to the provisions of S. 1361 as they relate to library photocopying and interlibrary loan in lieu of photocopies. The policy position as adopted by the association's board of directors in January 1973 is one which seeks to reach an intermediate position of accommodation between the seemingly irreconcilable positions of publishers and literary authors on the one side, and the positions of some parts of the library and educational communities on the other.

Special Libraries Association, with 8,000 members, is the second largest library, and information-oriented organization in the United States. It is estimated that there are more than 10,000 special libraries in the United States. The concept of special libraries or, in better words, specialized libraries is not well known among the general public or even in some segments of the library community itself. The interests and activities of specialized libraries are described briefly in the document submitted and in the annexed brochure. SLA is an association of individuals and organizations with educational, scientific, and technical interests in library and information science and technology, especially as these are applied in the selection, recording, retrieval, and effective utilization of man's knowledge for the general welfare and the advancement of mankind.

Our original emphasis on special subjects has been replaced more and more by the concept of specialized information services for a specialized clientele. The specialized clients are frequently the employees of our parent organizations. Thus the special library may be an intermediary between the actual user and the larger research libraries as represented by the two associations who have testified before me.

SLA is organized in 25 divisions representing broad fields of specialization ranging alphabetically from advertising to urban affairs.

The association is organized in 44 regional chapters ranging geographically from Hawaii across the continental United States, plus two chapters in Canada, and a European chapter.

Let me mention here that the association is in its own right a publisher of three periodicals and a number of books each year. Therefore, the association has its own interests as a publisher to conserve its sales income and royalty income.

SLA and its individual members would prefer continuation of the long-recognized concept that the preparation of a single copy constitutes fair use. But the association also recognizes that there may be some validity in the claims of publishers of periodicals that they may have some loss of income due to photocopying from a periodical issue that is still available in print. If the publication is out of print, that is, if a publisher has not maintained his stock in-print, it is difficult to see how there can be any lost income.

Further, the slow delivery demonstrated almost daily by publishers to fulfill an order for a single in-print issue is totally unacceptable to the needs of our specialized users who most often are required to make management decisions, research decisions.

Four items must be emphasized. One, totally unacceptable, is the concept that has been proposed of a central agency to determine whether an original is still available with a report period of, say, 21 days. The information needs and expectations of management are such that delivery in excess of 24 to 48 hours is incompatible with today's research and management decision processes.

Two, as a starting point, one potential solution is a provision for the payment of a per-page royalty on photocopies of copyrighted works. Such an arrangement has precedence already in the proposed Copyright Act in section 111, relating to cable transmissions, and sections 114, and 115, and 116, relating to sound recordings. A royalty tribunal of the type proposed in chapter 8 of the copyright revision bill, but, of course, with a different membership, could assure that the per-page royalty rate is reasonable.

Three, any legislative proposal should assure that libraries are not required to separately identify and account for each photocopy which they prepare, or to determine the allocation of the royalties, or to distribute the royalties for which they may be liable among the copyright proprietors.

Mr. BRENNAN. I am sorry, sir. Your time has expired.

Senator MCCLELLAN. We will extend your time a couple of minutes. Go ahead.

Dr. MCKENNA. If payment of a cents-per-page charge is enacted, the beneficiaries of such charges must themselves establish the agency in an ASCAP-style operation.

And four, the legislation to be enacted must not prevent or penalize the preparation of a photocopy for or by specialized libraries. There will be immeasurable damage to the economy and the welfare of the Nation if such intent should be contained in the enacted version of the bill, or if such interpretation is possible after enactment of the law.

We are grateful for the opportunity to present our views to the committee.

Senator MCCLELLAN. Thank you very much.

Any questions, Senator Burdick?

Senator BURDICK. No.

Senator MCCLELLAN. Staff would like to ask a question.

Mr. BRENNAN. Doctor, do you support the amendment that was presented to us earlier this morning by the two other library associations?

Dr. MCKENNA. Well, I did not see the statement until this morning, so I cannot make a statement on behalf of Special Libraries Association.

Senator MCCLELLAN. I would suggest you evaluate it and submit a statement regarding it.

Dr. MCKENNA. I would be pleased to do that.

Senator MCCLELLAN. Thank you, gentlemen.

[The prepared statement of Dr. McKenna follows:]

STATEMENT OF DR. MCKENNA, EXECUTIVE DIRECTOR, SPECIAL LIBRARIES ASSOCIATION

I wish to present the position of the Special Libraries Association with respect to the provisions of S. 1361 as they relate to library photocopying and inter-library loan in lieu of photocopies. The policy position as adopted by the Association's Board of Directors in January 1973 is one which seeks to reach an intermediate position of accommodation between the seemingly irreconcilable positions of publishers and literary authors on the one side, and the positions of some parts of the library and educational communities on the other.

Special Libraries Association, with 8,000 members, is the second largest library- and information-oriented organization in the United States. It is estimated that there are more than 10,000 special libraries in the U.S. The concept of special libraries or—in better words—the concept of specialized libraries is not well known among the general public or even in some segments of the library community itself. The interests and activities of specialized libraries are described briefly in this document and in the annexed brochure.[1] SLA is an association of individuals and organizations with educational, scientific and technical interests in library and information science and technology—especially as these are applied in the selection, recording, retrieval and effective utilization of man's knowledge for the general welfare and the advancement of mankind.

Special Libraries Association was organized in 1909 to develop library and information resources for special segments of our communities which were not adequately served by public libraries or by libraries in educational institutions. At first the emphasis was on special subject coverage in each special library as it related to the interests and business of its parent organization, for example: sources of statistical data for both corporations and the agencies of the national government and state governments; business data for banks and investment firms; chemical information for the then developing chemical industry; engineering information for the emerging complexes of engineering and construction companies, etc.

During the past 64 years—and with particular growing needs for rapid information delivery since World War II—specialized libraries and information centers have been established in all segments of our nation's affairs. They exist in for-profit enterprises and not-for-profit organizations, as well as in government agencies. Some are open to public use, and others have restricted access or are part of a for-profit organization. During this period of accelerated growth, the original emphasis on special subjects has been replaced more and more by the concept of specialized information services for a specialized clientele. An example of such a specialized information service for a specialized clientele is the Legislative Reference Service of the Library of Congress. Although the Library of Congress (as a whole) is often called a "national library," the entire Library of Congress itself is, perhaps, an outstanding example of a definition of service to a specialized clientele: The Congress of the United States of America.

The specialized clients are normally the employees of the parent organization. The specialized information services are based on the speedy availability of information, both for current projects and for management determination of decisions regarding future efforts of the parent organization. To these ends, the members of SLA include not only librarians, but also persons who are subject specialists—so that they can evaluate and screen out the irrelevant, the redundant and the too often useless portions of the voluminous published literature. The totality of the literature includes not only the publications of commercial publishers of copyrighted books and periodicals, but also the avalanche output of government agencies (often with security handling requirements) plus the parent organization's own internal corporate documents (with the obvious need to protect proprietary or competitive information).

As a parenthetical observation, it should be noted that the pioneering work in machine use for information storage and retrieval (now computerized) took place in specialized libraries and information centers in the 1940's and 1950's. Similarly, the need for miniaturization of the bulk of the literature in microforms occurred thru the influence of S.L.A.'s liaison with designers and manufacturers of microreading equipment.

Last, but not least, S.L.A. pioneered the concept of information networks—long before computers and other communication devices had been developed. S.L.A. has facilitated communications among its members through the Association's unique information network of Chapters and Divisions. Initiated more than 60 years ago, the network has been frequently updated in response to the needs of new informational requirements.

S.L.A. is organized in 25 Divisions which represent broad fields of specialization or information handling techniques. These fields range alphabetically from Advertising, Aerospace, and Biological Sciences thru Military Librarians, Museums, and Natural Resources, and on to Transportation, and Urban Affairs.

S.L.A. is also organized in 44 regional Chapters which range geographically from Hawaii across the continental United States (plus two Chapters in Canada) and on to a European Chapter (which encompasses geographically all the non-Socialist countries of Europe).

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[1] Annex. *Special Library Sketchbook.* S.L.A., N.Y. 1972, 45 p. Editors note, the document referred to may be found in the files of the Committee.

Special Libraries Association in its own right is a publisher of 3 periodicals and of an average of 6 books per year. Therefore the Association has its own interests as a publisher to conserve its sales income and royalty income. The Association's publications are needed by special groups, but they are in such areas of specialization that commercial publishers (or even vanity presses) would not touch them because of the small sales potential. Our subscription lists range from 11,000 as a high to 1,000 as a low. Our book sales average about 1,000 copies for each title with a range from 500 to our top category of "best sellers" at a level of about 3,000 copies sold per title.

Special Libraries Association and its individual members would prefer continuation of the long recognized concept that the preparation of a single copy constitutes "fair use." The Association recognizes that there may be some validity in the claims of commercial publishers of periodicals that they may have some loss of income due to photocopying of one article from a periodical issue that is still available in-print. If the publication is out-of-print (that is, if the publisher has not maintained his stock in-print), it is difficult to conceive how a photocopy of out-of-print material can cause any loss of income to the publisher.

Further, the slow delivery by publishers to fulfill an order for a single in-print issue is totally unacceptable to the needs of our specialized users who are responsible for fast management decision. There is little question that it is an administrative impossibility to secure publisher permissions to permit interlibrary response within any reasonable time. Moreover, the costs and delays in seeking such permissions would be prohibitive.

Four items must be emphasized:

(1) Totally unacceptable is the concept that has been proposed of an agency to determine whether an original is still available with a report period of, say, 21 days. The information needs and expectations of management are such that delivery in excess of 24 to 48 hours is incompatible with research and management decision processes.

(2) As a starting point, one potential solution is a provision for the payment of a per-page royalty on photocopies of copyrighted works. Such an arrangement has precedence, already in the proposed Copyright Act in § 111 (relating to cable transmissions), § 114 (sound recordings), § 115 (phono records), and § 116 (coin operated phono record players). A Royalty Tribunal of the type proposed in Chapter 8 of the Copyright Revision Bill, (but with a different membership composition) could assure that the per-page royalty rate is reasonable.

(3) Any legislative proposal should assure that libraries are not required to separately identify and account for each photocopy which they prepare, or to determine the allocation of the royalties, or to distribute the royalties for which they may be liable among the copyright proprietors. If payment of a "cents-per-page" charge is enacted, the beneficiaries of such charges (that is, the publishers) must themselves establish the agency for the collection and for the determination of pro rated payments to each publisher (in an ASCAP-style operation). Specialized libraries (and their parent organizations) can probably afford an added "cents-per-page" charge. But they cannot afford the added costs of record keeping and bookkeeping to issue checks for small amounts to each one among the multitude of publishers.

(4) The legislation to be enacted must not prevent or penalize the preparation of a photocopy for or by specialized libraries—particularly those in for-profit organizations. There will be immeasurable damage to the ecoomy and the welfare of the nation if such intent is contained in the enacted version of S. 1361, or if such interpretation is possible after enactment of the law.

The rapid transmission of man's knowledge—either to not-for-profit or to for-profit organizations—must not be impeded by law.

Special Libraries Association is grateful to the Subcommittee for the opportunity to present our views. The Association will be pleased to submit additional comments in the future if such would be appropriate.

Mr. Brennan. The next witnesses is Mrs. Felter on behalf of the Medical Library Association.

Mrs. Felter, you have been allocated 5 minutes.

STATEMENT OF JACQUELINE W. FELTER, DIRECTOR, MEDICAL LIBRARY CENTER OF NEW YORK, ON BEHALF OF THE MEDICAL LIBRARY ASSOCIATION

Mrs. Felter. I am Jacqueline W. Felter, director of the Medical Library Center of New York, a cooperative library service center maintained by a consortium of medical school and hospital libraries in the Metropolitan New York area. I am also a past president of the Medical Library Association, currently a member of the association's Committee on Legislation, and frequently the association's representative at meetings of the Ad Hoc Committee on Copyright Law Revision.

It is a privilege to have the opportunity to express the viewpoint of our membership.

The Medical Library Association, founded in 1898, celebrated its 75th anniversary this year. Its total membership is 2,854, of which 781 are institutional members and 1,755 are individual voting members. The remaining members are students in the United States and institutions and individuals in Canada and overseas.

The libraries and librarians are located in all types of health service facilities: medical schools, hospitals, research institutes, pharmaceutical firms, and medical societies. All are dedicated to helping the improvement of the quality of health care and extending it to every person in our Nation.

We are very pleased to find in sections 107 and 108 of S. 1361 recognition of photoreproduction as fair use of copyrighted publications by libraries under various conditions and for various purposes. We believe, however, that strict interpretation of the technical language of section 108(d)(1) would present serious operational problems. My remarks pertain especially to the scientific periodical literature.

Specifically, the bill calls for determination, prior to supplying a copy of a single periodical article to one individual, that the article is not available. This provision unfairly places a heavy burden on the user and the librarian.

Supplies of back issues in publishers' warehouses are expendable, and, often by the time a user has identified in an indexing or abstracting service or in the bibliography of another publication an article pertinent to his research or to the illness of one of his patients, the supply of the journal issue in which it was published may be depleted. Then the user must canvas the authorized reproducing services, such as the reprint dealers and microform publishers, because the average user is not knowledgeable about these sources; the search often is a collaborative enterprise of user and librarian. If the librarian has not participated in the search for an unused copy, the burden of proof is on the user and the librarian must decide whether or not to accept it.

The clerical chore of determining the availability of an unused copy would take, at best, a number of days, and more probably a number of weeks, thus setting up a timelag between the user and the published information he needs. In the health sciences, especially in the practice of patient care, the time factor can be critical.

Medical educators may suffer from delay in obtaining the published periodical literature, for many are both teacher and practicing physician, and time is of the essence as they coordinate two careers.

In closing, I remind you that health scientists do not receive compensation for the journal articles they write. This medical literature is usually a byproduct of research sponsored by society. Health scientists freely exchange information at regional, national, international meetings. Publication of their findings is an extension of their altruism.

The Federal Government encourages these humanitarian endeavors with grants of funds for research, including the payment of page charges to publishers and other expenses incidental to publishing. In addition. journals are often purchased with Federal funds in support of libraries.

The Association of Research Libraries and the American Library Association and others have proposed to the committee an amendment to section 108(d) of S. 1361. The language suggested for section 108 (d)(1) would eliminate the costly and time-consuming intermediate steps of determining the availability of an unused copy.

Therefore, on behalf of librarians who serve the health sciences, I respectfully request that the proposed amendment be incorporated in the bill, S. 1361. As has been pointed out, most of the developed countries of the world permit such "fair use" photocopy, and it is timely for our Nation to do the same.

Thank you.

Senator McClellan. Are the conditions that you submit here on page 4, comparable or identical to the amendment proposed by witnesses who have preceded you?

Mrs. Felter. Yes.

Senator McClellan. They are identical?

Mrs. Felter. I believe so. I'm not quite sure I understand your question.

Mr. Brennan. I think what the chairman is saying, do you support the amendment that was offered earlier this morning by the two libraries?

Mrs. Felter. Yes, indeed, and most heartily.

Senator McClellan. These conditions that you speak of here that would be provided for certain conditions are in accord with the proposed amendments submitted this morning by the other witnesses as I understand it?

Mrs. Felter. Yes.

We are particularly concerned with the technical language of 108 (d)(1).

Senator McClellan. All right.

Senator Burdick?

Senator Burdick. Thank you for your testimony, but I see the same argument used against your amendment as against the proposed legislation. In your proposed amendment, as I said to the previous witness, it is on the basis of a reasonable investigation that a copy cannot readily be obtained. This is the same weakness that you referred to in the proposed legislation?

Mrs. Felter. I am speaking particularly of the scientific periodical literature. It is not as easy to determine whether an unused copy is available. As I pointed out, publishers do not retain an inexhaustible supply of back issues, and back issues are not listed in books, such as Dr. Low mentioned. These are single issues of periodicals. Therefore, it is almost an insurmountable clerical chore to determine whether an unused copy is available. Even a telephone call does not help, because the publisher's office may be in one city, whereas his warehouse may be many miles away. There is a communication gap.

Senator Burdick. This is precisely the point I am making. But your amendment to correct the situation does the very same thing. Let me read it to you.

> The library or archives shall be entitled to supply a copy or phonorecord of an entire work, or of more than a relatively small part of it if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot readily be obtained from trade sources.

So you have to go through the same rigmarole under your own amendment.

Mrs. FELTER. We would in the case of obtaining a book or an entire work. However, section (1) would alleviate our problem with respect to the periodical literature, and this is of great concern to us, because at least two-thirds, more likely three-quarters, of the use of medical literature by physicians and researchers is not in book form but in journal form, for the reason that it must be up to date.

Senator BURDICK. But your amendment goes beyond the one book. It says "entitled to supply a copy or phonorecord of an entire work or of more than a relatively small part of it." So you have got parts and totals there, and you have to go through the same investigation, make a reasonable investigation.

I want to be helpful, but I can see the same shortcomings in your amendment as there is in the legislation you complain about, or you find short.

Mrs. FELTER. Well, as far as the medical library is concerned, if item 2 were omitted, I think that that would concern us less. It is item (1) that we are particularly concerned about, because that applies, as it says, to one article from a periodical issue. That is a relatively small part, rather than more than a relatively small part, since every issue contains a number of articles.

Senator BURDICK. Well, you see what I am talking about, that you have got some of the same shortcomings in both, and you do not really correct it.

Mrs. FELTER. Well, we feel that subitem (1) would correct the clause.

Senator BURDICK. But not 2?

Mrs. FELTER. But not—2 is not as significant, because we do not use the book materials as much, and we certainly would not copy an entire work if we could avoid it, because I think Dr. McCarthy pointed out it is a very expensive way to provide the literature.

Senator BURDICK. That leaves us with another problem. A relatively small part of it might be a collection or periodical issues.

Mrs. FELTER. Well, it is a question of what is considered as a relatively small part. People try to define a couple or a few. Probably there are as many definitions as there are people.

Senator BURDICK. Thank you.

Senator MCCLELLAN. Senator Fong.

Senator FONG. Under your amendment, you will require the person who comes for that article to ascertain whether there is any magazine existing on the stands?

Mrs. FELTER. As the bill is presently written, it would be necessary for us to do that, or perhaps to do it for him.

Senator FONG. Do you want that?

Mrs. FELTER. No; we did not want that, because determining whether there is available an unused copy of the journal in which is printed the article that is requested, might be a very time-consuming chore. And in the health sciences, time is frequently of the essence.

Senator FONG. So you feel that it is an unreasonable burden on you?

Mrs. FELTER. I think it is an unreasonable burden on us. I think it certainly is an unreasonable burden on the user, who is generally a practicing physician.

Senator FONG. And you would like the authority to issue him a Xerox copy without ascertaining whether there are any——

Mrs. Felter. That is correct. A single copy of the article from the scientific and periodical literature.

Senator Fong. You do not want to have the burden of proof on you to show that there is no copy existing?

Mrs. Felter. Well, certainly not. You know, no one likes to have the burden of accepting the word of someone without some evidence.

Senator Fong. Thank you.

Senator McClellan. And thank you very much.

Mr. Brennan. The American Chemical Society.

Seven minutes has been allocated to the American Chemical Society.

Dr. Cairns, could you identify yourself and your associates for the record?

STATEMENT OF ROBERT W. CAIRNS, EXECUTIVE DIRECTOR, AMERICAN CHEMICAL SOCIETY; ACCOMPANIED BY RICHARD L. KENYON, DIRECTOR, PUBLIC AFFAIRS AND COMMUNICATION DIVISION; BEN H. WEIL, CHAIRMAN, ACS COMMITTEE ON COPYRIGHTS; STEPHEN T. QUIGLEY, DEPARTMENT OF CHEMISTRY AND PUBLIC AFFAIRS; AND ARTHUR B. HANSON, GENERAL COUNSEL

Dr. Cairns. Thank you, Mr. Chairman, for the privilege of testifying today.

I wish first to introduce my compatriots and colleagues here. Mr. Ben H. Weil, who is chairman of the American Chemical Society Committee on Copyrights. Sitting next to him is Arthur B. Hanson, our ACS general counsel, with whom you and your staff, I believe, are acquainted; Dr. Richard Kenyon, on my right, who is director of our division of public affairs and communication. Sitting next to him is Dr. Stephen T. Quigley, director of the department of public affairs.

I brought these gentlemen along to answer questions, if they are needed, and to display to you our serious concern with this legislation.

I wish to read one paragraph from the written testimony and ask for its complete introduction into your record.

Senator McClellan. Your prepared statement—you want to read from it, sir?

Dr. Cairns. I just wish to read one paragraph.

Senator McClellan. Very well.

Dr. Cairns. I am testifying here on behalf of the American Chemical Society by authority of its board of directors. This is the largest scientific and educational society in America and I believe in the world—110,000 members, approximately.

We have a very large publishing activity which aggregates close to $30 million a year and hence we are very familiar with the economics of journal publication and the dissemination of scientific and technical information, which is a very vital link in the whole process of the development of science and technology in the world.

Now, I shall read from the central paragraph on page 11 of my statement. It is desirable that use be made of modern technology in developing optimum dissemination." We are certainly strongly in favor of the most modern methods and are developing the most modern methods of dissemination.

"This new technology includes the use of modern reprography, but as technology inherently includes economics the means of financial support of the system must be a part of its design. Therefore, photocopying should not be allowed under any circumstances unless an adequate means of control and payment is simultaneously developed to compensate publishers for their basic editorial and composition costs. Otherwise, 'fair use' or library-photocopying loopholes, or any other exemptions from the copyright control for either profit or nonprofit use, will ultimately destroy the viability of scientific and technical publications or other elements of information dissemination systems."

Now, I emphasize that I am speaking with regard to scientific and technical publications. In the chemical field, for example, there are a total of 400,000 manuscripts per year which are authored and printed ultimately, after due editing, in journals. There are approximately 10,000 journals which impinge on the chemical field. That means that, in the full field of science, there are perhaps five times as many journal articles and publishing societies. It is a very large group, and it is very vital in the dissemination field.

We have under our general guidance and responsibility the Chemical Abstracts service, which publishes 40,000 pages of abstracts and indices each year and issues this to all of the libraries, to all the scientists and engineers. This forms a vital link in dissemination.

We publish, in addition, separate journals that are issued approximately biweekly, which are 20 in number, and which aggregate about 40,000 pages a year, and which go to 330,000 subscribers.

Only 4 percent of the world's literature is published in this form by the ACS. However, we feel that this is of outstanding quality and represents the work of Nobel prize winners and other top scientists and engineers throughout the world. This is a vital link in the progress of science and technology.

Each worker writes reports and submits them to the journals. The editorial boards carefully screen and select them, edit them, and bring them into the line of quality of the journals they represent. The American Chemical Society assures the quality through peer analysis of the material submitted to the journals. All of science and technology rests on this communication link. It is essential to both research and education.

The first copy of each journal, counting all 20, costs the society $4 million a year. That is the first copy only. The overrun, or additional printing costs, amount to about $1 million a year. Somehow, we must recover both types of costs. Obviously, the collection, editing, formating, and composition of the journals has to be paid for by someone.

Today, it is paid for largely by subscribers. Even if libraries are to take over with their Xerox machines the entire publishing, it will be necessary for someone to compensate the publishers for the collection and editing and composition of the material which they copy. Otherwise, there will be nothing to copy.

The cost figures—if they are stated in terms of per page and per copy—are in pennies; somewhere in the realm of 1 cent to 10 cents a page is what it costs to create the editorial content. But, of course, if you have 10,000 pages and 10,000 copies, you come up to 100 million cents, or $1 million. So it is quite obvious that pennies per page can add up to very substantial amounts of money. And this is why I am talking to you now as I am.

The first copy cost must be collected if journals are to exist. Journals are essential because of the quality angle and the admission to the world's literature through peer review and analysis and editing. It is essential; otherwise, we would have an unsorted pile of millions of manuscripts a year, and who is going to do anything to them, in terms of intellectual analysis, if the publishing societies do not perform and cannot perform their tasks under the law and protect the results, which are the content of the copies of the journals which they submit?

Next month I am going to Russia. I am going to talk about copyrights. Last May, the Russians decided to join in the Geneva Copyright Convention, as you know. They came to the publishing societies of the United States and Canada and other places, to my knowledge, proposing that they enter into copyright licensing agreements for our publications. They have been admitting that they have copied for many years—multiple copies, not single copies—multiple copies are simply multiple copies of single copies.

They have been publishing and republishing our material in Chemical Abstracts, and now they come to us and ask for licensing considerations. And we are ready to answer them.

The strange thing is that in our own country, we have not been approached by anyone about copyrights, in spite of the tremendous amount of copying that is taking place. Now, it is rather strange if I go to Russia to negotiate something that we cannot even deal with here.

I think we can deal here. I think we can negotiate properly if the law protects our property correctly.

I think, then, in closing, all I would like to say is that we are in favor of this dissemination of information. We spend millions of dollars a year on it. The libraries are some of our best customers. But I think if they are going to copy and join in the supplementary publishing scheme that they should help to pay for the initial costs of collecting journals and the content that they represent.

Thank you for your time.

Senator McCLELLAN. Now, what journals do you have there that you are using as an illustration?

Dr. CAIRNS. The Journal of the American Chemical Society which is a broad coverage journal of all of the elements of subdisciplines of chemistry.

I have in addition, Chemistry, which deals with that particular branch.

Senator McCLELLAN. Let's just take one of them for an illustration; the first one.

Dr. CAIRNS. The Journal of the American Chemical Society is the major journal.

Senator McCLELLAN. How often is that published?

Dr. CAIRNS. Every 2 weeks.

Senator McCLELLAN. How many subscribers do you have?

Dr. CAIRNS. I will ask Dr. Kenyon.

Dr. KENYON. Between 16,000 and 17,000.

Senator McCLELLAN. I beg your pardon?

Dr. KENYON. Between 16,000 and 17,000.

Senator McCLELLAN. Between 16,00 and 17,000.

Are the subscriptions adequate to pay for the cost of publication and distribution?

Dr. CAIRNS. At present, there is a close balance on the economics of journal publication. We derive about half of our costs directly from subscribers.

I would guess in the case of the Journal of the American Chemical Society—because it is highly academic and has no advertising— that it would be about two-thirds.

Senator McClellan. What I am trying to get at—how is it financed now?

Have you been able to finance it?

Dr. Cairns. We finance by subscription, by page charges. In some of the technology publications, we have advertising. And we just balance the budget. It is very difficult.

Senator McClellan. Now, talking about balancing the budget, assuming an article that you publish in there it constitutes a page. It occupies one page in your journal. How do you arrive at, and what would you undertake to say would be a fair charge of a copyright fee for the copying of one page that a library might want to copy and give to a patron?

Dr. Cairns. A single page would be pennies per page, somewhere——

Senator McClellan. Would be what?

Dr. Cairns. Pennies per page.

Senator McClellan. A penny per page?

Dr. Cairns. Several cents a page.

Senator McClellan. Several cents a page.

How do you arrive at it? How would a librarian know how much to collect?

Dr. Cairns. I think we should have something approaching a uniform charge or a uniform set of charges for various journals. Each journal in science and technology carries a distinguishing mark, a coden, which is a six-letter term, which characterizes that journal. It would be easy enough to group these journals under their codens at a specific price of a certain number of cents per page. Somewhere between 1 cent and 10 cents, I assume, would probably generate enough money to take care of their share of the composition costs of the material being copied.

Senator McClellan. All right.

We have another book in the library, a book of poems, that has been copyrighted. Somebody wants to copy that poem.

How would you arrive at what would be a fair compensation or copyright fee for that?

It is five verses, but it is on one page of a small book.

Would you make any differentiation between that poem and a scientific article?

Dr. Cairns. I have to confine my testimony to scientific and technical communication.

Senator McClellan. All right. I will point out, though, to you the problems that we have. We are trying to legislate on every particular kind of journal and every particular kind of publication and information that may be copyrighted.

Dr. Cairns. I do not envy you that problem, but I do not think I want to try to answer for you.

Senator McClellan. We need some help, do you not see?

Dr. Cairns. We will help you on scientific and technological publications, because that is something that we know.

Senator McClellan. Thank you very much.

All right, Senator Burdick.

Senator Burdick. Just a minute. I want to get your position this morning as clearly as I can. I do it by example.

I am going back to Williston High School again. Suppose a senior is doing a paper on chemistry and he goes to the library in Williston, and he finds a copy of your journal, and he wants to take it home and type it. He wants one page.

Is it your contention this morning that, unless he pays for it, he should not have it?

Dr. Cairns. This would seem to me, perhaps, to come pretty close to a very limited fair use, but my contention is that if there is a change in ownership involved in the transfer of copied material that, thereby, there has to be some accounting. Since it is only a matter of a few cents, I think it would not stand in the way in the process of communication in this particular instance.

Senator Burdick. Your answer, then, is yes. You would not let him have it until he paid for it.

Dr. Cairns. Yes.

Mr. Weil. I would like to speak to this.

The mechanisms by which these pennies per page could be collected are severalfold. One of them that we have heard about in the Special Libraries Association was the idea of a royalties tribunal, which in turn would, through the various collection mechanisms and various distribution mechanisms distribute the few cents per page in the aggregate to the owners of the copyright. The library chore of recording could perhaps be done mechanically. It could be done by sampling. There are many techniques. So that the students involved, while he might, indeed, have to pay a few cents, or he might not have to pay a few cents, depending on how that library chose to operate. The mechanisms for collection and payment would not need to be donors.

Senator Burdick. Well, I gather from your testimony that you would not permit the young man to have this material without paying for it.

Now, to get to the next question. In the libraries across the country, in my sort of country, you could not possibly set up a mechanism for distributing the money. Suppose you get this one page out of this book and pay 5 cents for it. Why, the postage to give you that 5 cents by mail would be more than that. And to keep a running account and to be keeping books would be impossible for small libraries.

The question is, either he gets it or he does not get it. It is a practical matter.

Mr. Weil. No. There are mechanisms. Right now, that student if he wishes to use a machine for himself drops into it a dime or a quarter. So that the collection mechanism could be part of that dime or quarter which he puts in. How that money is distributed right now—most of it goes to the vendor who supplies the machine.

But there are methods that I mentioned—sampling; the Coden that was mentioned that would identify the journal is a method, also which could be electronically counted by the machine at the time of copy. The student would not need to be bothered. Right now, he must drop a dime or a quarter into the machine.

Senator Burdick. You mean to say that the library at Williston has electronics, has got money for stuff like that?

Dr. Cairns. May I ask Counsel to answer?

Mr. Hanson. Senator, believe it or not, it does. And if it does not, it should have. I would suggest to you that, obviously, in any approach to this, you have to use common sense and practicality.

Senator **Burdick.** That is right.

Mr. **Hanson.** The American Chemical Society is not interested—and I do not believe any other publisher is—in picking up the single page that a student is going to use. But remember, your premise was that he was going to take this out and copy it himself at home.

Senator **Burdick.** No, no.

Mr. **Hanson.** If he sat down in the library and wanted to take whatever notes he wanted to out of that page, that is obviously a fair use under the settled law of the land.

I would suggest that what we are speaking to here is the practice that has arisen in the last few years of heavy copying by certain major metropolitan libraries, for the most part, which have made inroads into the publisher's ability to meet his costs, to make his material available. And I think this is really the problem that the committee must address.

Senator **Burdick.** I understand the problem.

But in my hypothetical question, I did not have the young man taking the periodical out. I had him take the photostatic part home.

Dr. **Cairns.** There are other ways to meet your question other than an educational exemption, which I believe you were speaking to. I do not believe that we can have or afford an educational exemption, because we, in producing journals, are an essential link in the educational process. Therefore, we must have some means of recovery.

It might be through licensing through the library to allow them to do this practice that you described, and it would be at their behest. And this, as a matter of fact, was at issue in the Williams and Wilkins case, of which we are a party in having submitted an amicus curiae brief. We are normally on the side of education and science, because this is our charter.

We are also interested in preserving the function of continued dissemination of scientific and chemical information, so we must come to a practical determination, just as you people must.

Senator **McClellan.** Let your brief that you submitted be filed and be marked as an exhibit to your testimony. Or would you like to have it printed in the record?

Dr. **Cairns.** Yes, we have submitted the full testimony for the record, and we also would ask the privilege, if you are agreeable, to let other scientific societies submit statements for the written record in the period of time to August 10.

Senator **McClellan.** That is agreeable. They may do so.

Senator Fong?

Senator **Fong.** Are the articles in your magazine originally written by your people?

Dr. **Cairns.** These are articles that are originally written by scientists and engineers throughout the world.

Senator **Fong.** For your magazine?

Dr. **Cairns.** No. They are written in the first instance to record the works of the scientists and engineers. They are submitted for acceptance or rejection, or editing by the editors of our prospective periodicals, and they may or may not be accepted.

Senator **Fong.** Do you pay them for this?

Dr. **Cairns.** We do not. As a matter of fact, in most of the scholarly journals of which I have spoken, there is a system of page charges, in which the author pays up to $50 a page to help absorb the cost of publication. And this is recognized as a policy by the U.S. Government, as enunciated by the Federal Council on Science and Technology, I think, about 1963, that all these Federal grants can be used for the purpose of these charges—payment of page charges—on their scientific works into nonprofit journals.

Senator Fong. So actually, you have not paid for the article?

Dr. Cairns. We have not paid anything for the article. In fact, we usually get a page charge for publishing.

Senator Fong. Yes, and he pays you for it, certainly—for the publication?

Dr. Cairns. He pays page charges at a rate of $50 a page for the scholarly journals.

Senator Fong. You say, since you publish it, the man who copies that should pay you or pay him?

Dr. Cairns. The man who publishes—who recopies—our publication should pay us so that we can be compensated for the costs of creating the first copy, before the overrun cost of thousands of copies, which we also have.

Senator Fong. So, then, you would enter into an agreement with the writer of the article.

Dr. Cairns. The writer of the article invariably puts the copyright with the American Chemical Society.

Senator Fong. I see.

Now, would you consider an exemption? Say, a little boy who takes the book home and copies, say, two or three pages of it, or he makes two or three xerox copies. Would you exempt such a child from paying any fee?

Dr. Cairns. No, the exemptions that you exemplify by this particular case would represent the educational exemption, and the educational process is a part of what we contribute to in our dissemination of scientific and technical literature. We are a part of the educational process, and if we are to continue to exist, we must be compensated the way anyone else does.

Senator Fong. So you think that this little boy should pay for that?

Dr. Cairns. He must, if we are not to have a general educational exemption.

Senator Fong. Now, who is going to do the collecting?

Dr. Cairns. I would say that the person who is in the control point in this case would probably be the librarian.

Senator Fong. How would she know?

Dr. Cairns. Their Xerox machine is usually indoors.

Senator Fong. If he took the book home, how would she know?

Dr. Cairns. I do not think she would if he took the book home. It would be a little difficult to police. But that does not excuse not having a law to say that this is not legal.

Senator Fong. So, if he asks the librarian to Xerox the copy, then you want the librarian to collect the money?

Dr. Cairns. I see no other rational way to do this.

Senator Fong. Suppose in 1 month there is only one page that is copied, and you charge only cents for that copying. You expect the librarian to put all her time to collect that money for you and send it back to you?

Dr. Cairns. No. I would say that we would only be interested in substantial payments, and there might be a clause which would rule out anything below $1 or $10. We are talking here in terms of millions of dollars.

Senator Fong. This is what I am asking where is the exemption? Would you say that we charge those who make a profit out of it, and we do not charge those who do not make a profit of it? Where is the exemption?

Dr. Cairns. There is no profit here. This is only compensation for costs that are incurred in creating the journal.

Senator Fong. You say many of these are metropolitan libraries?

Dr. Cairns. They have photocopying devices, yes.

Senator Fong. And they have photocopying devices and they print thousands of copies and disseminate it. And these are the people you want to stop?

Dr. Cairns. No, I do not want to stop them. I wish it to continue.

Senator Fong. Stop them from copying without paying?

Dr. Cairns. I wish to receive enough compensation so that, in proportion to the total number of copies circulated, that these Xerox copies carry their share of the composition costs.

Senator Fong. These people—these Xerox copies of your publications—are they making a profit?

Dr. Cairns. I do not think the concept of profit is applicable here, because they are, in the first place, nonprofit organizations. But that does not save the American Chemical Society, which is a nonprofit organization, from going broke if all of our works are copied.

Senator Fong. We are trying to get at the facts. We do not know the facts. We are asking you as to whether they—are they making a profit, or are they not making a profit?

Dr. Cairns. No.

Senator Fong. So most of the people who copy your works do not make a profit. Is that correct?

Dr. Cairns. That is correct.

Senator Fong. So you say that these people who copy your works should pay for them?

Dr. Cairns. They should pay the portion of the composition costs which their copying represents, in terms of that number of copies to the total number of copies.

Senator Fong. Then you would not exempt any part of it at all?

Dr. Cairns. That would be about right, with the possible exception of the subscriber making copies for his own use for convenience.

Senator Fong. Thank you, sir.

Senator McClellan. Thank you very much.

Mr. Kenyon. May I enter a simple factual correction? You asked the subscription circulation of the Journal of the American Chemical Society. I stated it was between 16,000 and 17,000. That was true last year.

The circulation on journals is falling, and as of June 30, 1973, it was 14,726.

Senator McClellan. Very well.

I only wanted to use that as an illustration.

Dr. Kenyon. Well, I did not want an inaccuracy in the record.

[The prepared statement of Dr. Robert W. Cairn's follows:]

Statement of Dr. Robert W. Cairns, Executive Director, American Chemical Society

Mr. Chairman and members of the Subcommittee: My name is Robert W. Cairns. I am the Executive Director of the American Chemical Society and, with the authorization of its Board of Directors, I appear before you today to present the Society's statement. I have spent 37 years in industry and retired as Vice

President of Hercules Incorporated on July 1, 1971 to accept the position of Deputy Assistant Secretary of Commerce for Science and Technology. I resigned from that position on December 1, 1972, on acceptance of my present appointment. Accompanying me today are Dr. Richard L. Kenyon, Director of the Public Affairs and Communication Division, Mr. Ben H. Weil, Chairman of the Society's Committee on Coyprights, and Dr. Stephen T. Quigley of the Department of Chemistry and Public Affairs of the American Chemical Society, and Arthur B. Hanson, General Counsel of the Society.

We appreciate being given this opportunity to comment on the certain features of the Copyright Revision Bill, S. 1361. The issues addressed by this legislation are both fundamental to the formulation of national science policy, and of vital significance with respect to the ability of our society to resolve many of the problems which confront it. These issues have been under discussion for some time now by the Committee on Copyrights of the Board of Directors and Council of the American Chemical Society, as well as by other similar scientific societies, and a general consensus on them has been under development. This consensus has been developed in the context that the protection of copyrighted material will "promote the Progress of Science and Useful Arts", as specified in Article I, Section 8, Clause 8 of the Constitution of the United States. The viewpoint which we attempt to express is that of the chemical scientific and technological community, as represented by the American Chemical Society.

The American Chemical Society is incorporated by the Federal Congress as a non-profit, membership, scientific, educational society composed of chemists and chemical engineers, and is exempt from the payment of federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended.

The American Chemical Society consists of more than 107,000 such above described members. Its Federal Charter was granted by an Act of the Congress in Public Law No. 358, 75th Congress, Chapter 762, 1st Session, H.R. 7709, signed into law by President Franklin D. Roosevelt on August 25, 1937, to become effective from the first day of January, 1938.

Section 2 of the Act is as follows:

"Sec. 2. That the objects of the incorporation shall be to encourage in the broadest and most liberal manner the advancement of chemistry in all its branches; the promotion of research in chemical science and industry; the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; the increase and diffusion of chemical knowledge; and by its meetings, professional contacts, reports, papers, discussions, and publications, to promote scientific interests and inquiry, thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people."

Its Federal Incorporation replaced a New York State Charter, which had been effective since November 9, 1877.

One of the principal objects of the Society, as set forth in its Charter, is the dissemination of chemical knowledge through its publications program. The budget for the Society for the year 1973 exceeds $36,000,000 of which more than $29,000,000 is devoted to its publications program.

The Society's publication program now includes twenty journals, largely scholarly journals that contains reports of original research from such fields as medicinal chemistry, biochemistry, and agricultural and food chemistry, but also a weekly newsmagazine designed to keep chemists and chemical engineers abreast of the latest developments affecting their science and related industries. In addition, the Society is the publisher of Chemical Abstracts, one of the world's most comprehensive abstracting and indexing services. The funds to support these publications are derived chiefly from subscriptions.

The journals and other published writings of the Society serve a very important function, namely: they accomplish the increase and diffusion of chemical knowledge from basic science to applied technology. In so doing, they must generate revenue, without which the Society could not support and continue its publications program in furtherance of its Congressional charter to serve the science and technology of chemistry. The protection of copyright has proved an essential factor in the growth and development of the scientific-publishing program of the Society.

The twenty periodical publications of the Society produce more than 41,000 pages a year and subscriptions in 1972 totaled 330,000. Chemical Abstracts annually produces more than 150,000 pages which go to 5000 plus subscribers. Its abstracts number in excess of 380,000 yearly and its documents indexed in excess of 410,000. The single greatest source of income for all ACS publications is subscription revenue.

As is indicated by the objectives of the American Chemical Society, we believe that the effective dissemination of scientific and technical information is critical to the development, not only of the society and economy of the U.S.A., but also of modern society worldwide.

Scholarly journals are the major instruments for disseminaton and recording of scientific and technical information. These journals are expensive to produce. If the costs are not supported financially by those who make use of them they cannot continue. There is no adequate substitute in sight.

The scholarly scientific or technical journal is more than merely a repository of information. The scientific paper is the block with which is built our understanding of the workings of the world around us. In his papers, each scientist records his important findings for the permaanent record. His successors then have that knowledge precisely recorded and readily available as a base from which they may start. So the process continues in a step-by-step fashion from scientific generation to scientific generation, each worker having available to him or her the totality of the knowledge developed up to that time. Each scientist stands upon the shoulders of his predecessors.

But this analogy of simple physical structure is inadequate, for at least of equal importance is the continuous refinement that takes place. Before new knowledge is added to the record, it is reviewed, criticized and edited by authoritative scholars; then, once published, it is available in the record for continued use, criticism, and refinement. New findings make possible the revelation of weaknesses in the earlier arguments and conclusions, so that as the structure of scientific knowledge is built higher it is also made stronger by the elimination of flaws. While it has been said that mankind is doomed to repeat its mistakes, the system of scientific recording in journals is designed to prevent the repetition of such mistakes and to avoid building upon erroneous conclusions. The scholarly journal record is the instrument for insuring this refining process.

In addition, journal papers form an important part of the basis upon which a scientists' standing among his peers is judged. For this reason, scientific scholars are willing to give their time and effort to help produce these evaluated records and are also willing to leave the management of the copyright on their papers in the hands of the scientific societies. These scholars are rarely concerned with private income from their published papers, but they are vitally concerned with the preservation of the intrinsic value of the scientific publishing system.

Publishing costs have risen and are rising continuously, making the continuation of the scientific-journal system increasingly difficult. This has been recognized by the U.S. Government in acknowledging the philosophy that scientific-research work is not complete until its results are published, and in establishing a policy which makes it proper that money may be used from federal support of research projects to help to pay the cost of journal publication. It is this policy which provides most of the funds for paying page charges, charges originally designed to pay the cost of bringing the research journal through the editing, composition, and other production steps, up to the point of being ready to print. However, publishing costs are now so high that these page charges no longer pay even for these initial parts of the publishing process. American Chemical Society records in 1972 show that page charges supported one-third or more of those costs for fewer than 30% of ACS jorunals.

Publishing cost *must* be shared by the users. If these users are allowed, without payment to the journal, to make or to receive from others copies of the journal papers they may wish to read, it is not likely they will be willing to pay for subscriptions to these journals. If and as free photocopying of journals proceeds, the number of subscribers will shrink, and subscription prices will have to rise. The reduction of subscription income may continue to the point of financial destruction of these journals.

The problems of the commercial publishers of many good scientific journals are even more severe, because these publishers do not have the moderate assistance of page charges.

The doctrine of fair use, developed judicially but not legislatively, has long been useful to the scholar, for it has allowed him to make excerpts to a limited extent for purposes of the files used in his research. However, the modern technology of reprography has offered such mechanical efficiency and capacity for copying that it is presently endangering the protection given the foundations of the scholarly journal by copyright. "Excerpts," instead of being notes, sentences, or paragraphs, are being interpreted to mean full scientific papers, the aforementioned building blocks.

As the copyrighted journal system developed, it was agreed long ago that the scholar should be allowed to hand-copy excerpts for use as background information. As a further step, authors became accustomed to ordering reprints of their papers to send to their colleagues to put into their files or briefcases as a means of assuring a good record of the progress of work in the field concerned. This was followed, 20–30 years ago, by some minor use of the old "Photostat" machine. While that process strained a little the proprieties of copyright, it was fairly generally agreed that the mechanics of the practice were such as to help the research scientist while difficult and costly enough not to undermine the basic structure of the journal system.

However, in the past decade the techniques of reprography have advanced to such an extent that third parties, human and mechanical, are beginning to be involved in a substantial way. It now is practical to build what amounts to a private library through rapid copying of virtually anything the scholar thinks he might like to have at hand. While this process has obvious personal advantages, it is now being done extensively and increasingly without these scholars—or the libraries which copy for them—making any contribution to the cost of developing and maintaining the basic information system that makes it possible. Even conservative projections of the development of reprographic techniques within the next decade make it clear that the economic self-destruction of the system within the next decade is a real possibility. Overly permissive legislation could make this destruction a certainty.

Use of a journal by an individual for extracting from it with his own hands, by hand-copying the material specifically needed and directly applicable to his research, is one thing. A practice in which an agent, human or mechanical, acts as copier for an individual or group of individuals wishing to have readily available, without cost, copies of extensive material more or less directly related to his or their studies and research, is quite a different matter. The latter is certainly beyond justification on the mere grounds that technology has made it convenient, nor that the purposes are socially beneficial.

While I am not aware of documented direct proof that photocopying is seriously eroding the subscriptions to scholarly journals, the decline in paid circulation of those journals in recent years is reported by many publishing societies. During the past three years, ending December 31, 1972, the paid circulation of the *Journal of the American Chemical Society* has declined from 19,419 to 16,139 and as of June 30, 1973 had declined further to 14,726; that of the *Journal of Organic Chemistry* had declined from 10,557 to 9,217 and as of June 30, 1973 had declined further to 8,575; and that of the *Journal of Physical Chemistry* from 6,448 to 5,459 and as of June 30, 1973 declined further to 4,997. Others have declined comparably.

Documented evidence of the increase in photocopying is found in "A Study of the Characteristics, Costs, and Magnitude of Inter Library Loans in Academic Libraries," published in 1972 by the Association of Research Libraries. There we find that in 1969–70 the material from periodicals sent out in response to requests for "interlibrary loans" filled by the academic libraries surveyed was 83.2 percent in photocopy form as compared with 15.2 percent in original form and 1.4 percent in microform.

In that same report the volume of interlibrary loan activities from academic libraries is traced. It grew from 859,000 requests received by academic lending libraries in 1965–66 to 1,754,000 in 1969–70, and is projected to reach 2,646,000 in 1974–75.

These data give some indication of the trends in use made of the published literature without contribution of any share of the very considerable cost of evaluating, organizing, and publishing it.

No suggestion is intended here that the use of better means of dissemination should be prevented. What *is* urged is that such dissemination should not be allowed without its sharing the costs of the basic steps that make such dissemination possible.

An understanding of these facts and a willingness to share these costs is indicated in a statement recently approved by the Board of the ‘Special Libraries Association and published in its magaine, "*Special Libraries*" in March, 1973. The key section of this statement reads ". . . it would seem appropriate for SLA as an organization comprised of both private and public libraries to seek a rational legislative solution to photocopying problems which will reasonably satisfy the needs of libraries and their patrons and which will protect publishers and authors.

As a starting point, one potential solution might be the making of provision for the payment of a per-page royalty on photocopies of copyrighted works. Such an arrangement has precedence already in the proposed Copyright Act in Section 111 (relating to cable transmissions), Section 114 (relating to sound recordings), Section 115 (relating to phonograph records), and Section 116 (relating to coin-operated record players).

"A Royalty Tribual of the type proposed in Chapter 8 of the Copyright Revision Bill, but with a different membership composition, could assure that the per-page royalty rate is reasonable."

Recognition of the responsibility to pay for extensive copying of the literature recently has been given by the USSR, which for years has been copying scholarly journals without payment. In May, 1973, the USSR declared its adherence to the Universal Copyright Convention. Its representatives have approached the American Chemical Society, the American Institute of Physics, the Institute for Electrical and Electronic Engineers, and other publishing societies—as well as commercial publishers—both in the U.S. and abroad, to begin negotiations for the payment of royalties for such copying. To say the least, it would be surprising to find the USSR paying a fair share of the costs of publishing our scientific literature that it copies while the users in the U.S. do not.

It is desirable that use be made of modern technology in developing optimum dissemination. This technology includes the use of modern reprography, but as technology inherently includes economics the means of financial support of the system must be a part of its design. Therefore, photocopying should not be allowed under any circumstances unless an adequate means of control and payment is simultaneously developed to compensate publishers for their basic editorial and composition costs. Otherwise, "fair use" or library-photocopying loopholes, or any other exemptions from the copyright control for either profit or non-profit use, will ultimately destroy the viability of scientific and technical publications or other elements of information dissemination systems.

The copyright law is directed to the interest of the public welfare. It is not in the interest of the public welfare to modify the copyright law so as to allow the economic destruction of the scientific and technical information system.

In conclusion, I would like to bring to the Committee's attention the American Chemical Society's Amicus Curiae Brief filed in support of the Report of the Commissioner in The Williams & Wilkins Co. v. the United States case, now being decided in the United States Court of Claims. Since the Committee is well aware of this case, I will not comment further but will submit a copy of the Society's brief, which is consistent with my statement, for inclusion in the record.

Enclosure.

IN THE

UNITED STATES COURT OF CLAIMS

[NO. 73-68]

The Williams & Wilkins Co., PLAINTIFF v. *The United States*, DEFENDANT

BRIEF ON BEHALF OF THE AMERICAN CHEMICAL SOCIETY, AS AMICUS CURIAE, IN SUPPORT OF THE REPORT OF THE COMMISSIONER

The American Chemical Society respectfully submits that compensation for the copying of copyrighted material pursuant to the Copyright Act of 1909 will "promote the Progress of Science and Useful Arts," as specified in Article I, Section 8, Clause 8 of the Constitution of the United States. Accordingly, the Society supports the position taken by the Report of the Commissioner as set forth in his Findings of Fact, Recommended Conclusions of Law and Opinion, bearing date of February 16, 1972.

THE INTEREST OF THE AMICUS

The American Chemical Society is incorporated by the Federal Congress as a non-profit, membership, scientific, educational society composed of chemists and chemical engineers, and is exempt from the payment of federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended.

As of October 30, 1972, the American Chemical Society consisted of more than 110,000 such above described members. Its Federal Charter was granted by an Act of the Congress in Public Law No. 358, 75th Congress, Chapter 762, 1st Session, H.R. 7769, signed into law by President Franklin D. Roosevelt on August 25, 1937, to become effective from the first day of January, 1938.

Section 2 of the Act is as follows:

"Sec. 2. That *the objects* of the incorporation *shall be to encourage in the broadest and most liberal manner the advancement of chemistry* in all its branches; *the promotion of research in chemical science and industry;* the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; *the increase and diffusion of chemical knowledge; and by its* meetings, professional contacts, *reports, papers,* discussions, and *publications, to promote scientific interests and* *inquiry*, thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people." (emphasis supplied)

Its Federal Incorporation replaced a New York State Charter, which had been effective since November 9, 1877.

One of the principal objects of the Society, as set forth in its Charter, is the dissemination of chemical knowledge through its publications program. The budget for the Society for the year 1973 exceeds $36,000,000, of which more than $29,000,000 are devoted to its publications program.

The Society's publication program now includes twenty journals varying from scholarly journals, containing reports of original research from such fields as medicinal chemistry, biochemistry, and agricultural and food chemistry, to a weekly newsmagazine designed to keep chemists and chemical engineers abreast of the latest developments affecting their science and related industries. In addition, the Society is the publisher of CHEMICAL ABSTRACTS, one of the world's most comprehensive abstracting and indexing services. The funds to support these publications are derived chiefly from subscriptions.

The journals and other published writings of the Society serve two important functions, namely: first, they accomplish the increase and diffusion of chemical knowledge and related purposes of the Society; second, they generate revenue, without which the Society could not support and continue its publications program in furtherance of its Congressional charter to serve the science and industry of chemistry. The protection of copyright has proved an important factor in the growth and development of the scientific-publishing program of the Society.

The Society's publications, accompanied by the periodicity of publication and the cost to subscribers, are as follows:

Publication	Periodicity of publication	Circulation	Rates	
			Members	Nonmembers
Chemical Abstracts	Weekly	[1] 3,237 [2] 2,241		$2,400.00 1,900.00
Constituents and Derivatives of Chemical Abstracts	No set schedule	[3] 12,000		35.00-100.00
Journal of American Chemical Society	Biweekly	16,086	$22.00	66.00
Chemical and Engineering News	Weekly	124,737	3.00	8.00
Analytical Chemistry	Monthly	31,009	5.00	7.00
The Journal of Physical Chemistry	Biweekly	5,438	20.00	60.00
Journal of Agricultural and Food Chemistry	Bimonthly	4,915	10.00	30.00
The Journal of Organic Chemistry	Biweekly	9,168	20.00	60.00
Journal of Chemical and Engineering Data	Quarterly	2,247	15.00	45.00
Journal of Chemical Documentation	do	1,989	7.00	21.00
Biochemistry	Biweekly	6,584	20.00	60.00
Inorganic Chemistry	Monthly	5,087	18.00	54.00
Journal of Medicinal Chemistry	do	3,789	15.00	45.00
Chemical Reviews	Bimonthly	5,674	13.00	39.00
Chemistry	Monthly	31,995	6.00	9.00
I&EC Process Design and Development	Quarterly	7,247	7.00	21.00
I&EC Fundamentals	do	7,307	7.00	21.00
I&EC Product Research and Development	do	7,345	7.00	21.00
Environmental Science and Technology	Monthly	27,869	6.00	9.00
Macromolecules	Bimonthly	2,305	12.00	36.00
Chemical Technology	Monthly	15,000	9.00	18.00
Accounts of Chemical Research	do	12,000	5.00	15.00

[1] Company and individual.
[2] Universities.
[3] In excess of.

Note: Additionally, the Society publishes on a nonperiodical basis the following: Director of Members; Abstracts of Meeting Papers; Advances in Chemistry Series; Seidell's Solubilities of Inorganic and Organic Compounds; Specifications and Test Methods for Laboratory Compounds; Specifications and Test Methods for Laboratory Reagent Chemicals; Collective Indexes to Chemical Abstracts and Society Journals; Such other books, pamphlets, and reprints as may be authorized by the board of directors.

These twenty periodical publications of the Society produce more than 41,000 pages a year, and CHEMICAL ABSTRACTS produces more than 150,000 pages a year. Its abstracts number in excess of 380,000 and its documents indexed in excess of 410,000.

From the foregoing, it is obvious that the amicus has a deep and abiding interest in the outcome of this case. It should also be obvious why the amicus supports the position of the plaintiff in the case; it is abundantly clear that, in working toward the objective of the advancement of the science and technology of chemistry, the most effective possible dissemination of information is a primary requirement. In order to effect this, the American Chemical Society, operating as a not-for-profit society, works to build the best possible record of scientific knowledge related to chemistry and to find ways to get as effectively as possible, that knowledge into the hands of those who need and use it. On the one hand, there is the problem of cost per user, which we endeavor to maintain at a level which will not be a serious barrier. On the other hand, the expenses of doing this are very considerable and they must be met in full or else the system will begin to degenerate. If, through copying and distribution which brings no return at all to the American Chemical Society, this material is made available so that users need not subscribe to the publications, the process will lead to a reduction of paid circulation and a smaller base over which to distribute the costs, thus driving up the unit costs. Appreciable rises in cost would defeat efforts to maintain the objective of broad and effective dissemination.

The amicus believes that the actions of which the plaintiff complains have a deleterious effect on its objects as set forth above.

ARGUMENT

Having carefully examined the Commissioner's Findings of Fact, Conclusions of Law, and Opinion, the plaintiff's brief, the defendant's brief and the briefs of all the amici, both pro and con, the American Chemical Society strongly supports the Commissioner's Report and the authorities cited therein. The Society likewise supports the position of the plaintiff as set forth in its brief and adopts the authorities cited therein.

The effort of the defendant to equate its copying procedures to the doctrine of "fair use" as set forth in the existing case law is legally indefensible. The proper place for such an argument is before the Congress.

The Court may take notice of the fact that an effort to attain an omnibus revision of the Copyright Law has been under way for the past seventeen years. This effort has been headed by Senator John L. McClellan's Senate Judiciary Subcommittee on Patents, Trademarks and Copyright and is set forth in S. 644 of the last session of Congress. The Society took a position on such legislation as early as May 5, 1967, when Dr. C. G. Overberger, the then president, expressed the Society's views in a written communication to that Subcommittee.

The position expressed then is still essentially the Society's position. During the intervening years, the Society has continuously reviewed the perplexing problems resulting from the growth of technology vis-a-vis copying in various forms and the expressed desire of some segments of the scientific community for freer access at little or no cost to individual users, with the view that this is their right in the name of research. It must be noted that this use, namely freedom to copy for individual users, as supported by the defendant's brief and epitomized by the National Library of Medicine's practices, is supported by the tax dollars of all the people of the United States without any concurrent legislative authority for same. This is inimical to our free enterprise system and to our system of checks and balances.

Now, as stated above, the Society has attempted to find a means of accommodating these conflicting viewpoints and it has offered the following to the Senate Subcommittee.

The doctrine of "fair use" is set out in Section 107 of the proposed legislation. Title II of the proposed legislation calls for the establishment of a National Commission for New Technological Uses of Copyrighted Works. The Society supports the establishment of this proposed Commission.

In light of the fact that other facets of the proposed legislation would appear to further limit the rights of a copyright proprietor and the fact that the amici supporting the defendant herein are actively lobbying for the position they support here, we are suggesting that no change be made as to "fair use" until the Commission is established and it has made a detailed, *scientific* study of this problem.

CONCLUSION

The American Chemical Society disseminates more scientific information in the field of chemistry than any other organization. Its accomplishments in this area have been recognized both by Congress and by other branches of government. Its investments are great from the standpoint of both manpower and dollars. We believe that our service program is a vital service which must be continued. The Society is deeply concerned, however, that the unauthorized use of materials under an increasingly liberalized "fair use" doctrine could impair or even destroy our ability to generate, publish, and disseminate such ~~scientific~~ information in the future. While the Society in no way seeks to hamper or restrict either the learning process or the use of technological developments and equipment needed to improve the exchange of information, it cannot be oblivious to the effects of these developments on the essential financial support needed to continue the publishing function which generates the basic materials.

The Society conducts research and experimentation on the use of computers and allied electronic devices for the handling and dissemination of scientific information. Based on our experience and observations of the work of others doing research in this area, we see that such developments are leading us toward systems where a single original work will be used to disseminate multiple copies as well as a variety of subcollections of information derived from the original work. In effect, we are in the process of enhancing the distribution of an authors works by replacing the capability of printed plates with the capability of electronic processing.

The American Chemical Society is actively engaged in a continuing program of development and study relative to convenient access by users, including photocopying and the use of computerized technology, in an effort to find solutions which are compatible with the best interests of both copyright producers and users. We are vigorously pursuing a long-standing program to provide interested persons with copies of materials copyrighted by the Society, quickly and at the lowest possible cost, and to license others to reproduce such materials. We are doing all this because we clearly understand the need of chemists for quick and ready access to our published chemical information, and desire to adapt to their service the advantages of new communications technology.

Although we have no figures to indicate precisely the volume of current uncontrolled copying in terms of subscription losses, it does appear that the amount of photocopying of chemical publications is considerably higher than in other fields of science. In a study of the copying of technical journals from the New York Public Library, five American Chemical Society Journals appeared on the list of 22 most copied journals, and ranked, 2, 3, 5, 12, and 13, respectively. Bonn George S., "Science Technology Periodicals," Library Journal, 88(5), 954–8, March 1, 1963. Later studies have shown similar results.

Accordingly, the Society reiterates its support of the plaintiff and of the Commissioner's Report and respectfully urges that this Honorable Court deny the defendant's position and uphold the plaintiff's petition and the judicially accepted concept of "fair use".

Respectfully submitted,

ARTHUR B. HANSON,
Attorney for Amicus Curiae,
The American Chemical Society.

HANSON, O'BRIEN, BIRNEY,
STICKLE & BUTLER
Of Counsel.

Mr. BRENNAN. Ambassador Kenneth Keating.

Senator MCCLELLAN. You are welcome, sir, and we appreciate your appearance before the committee, and we will listen to your words of wisdom.

STATEMENT OF AMBASSADOR KENNETH B. KEATING, HARCOURT BRACE JOVANOVICH, INC., AND MACMILLAN, INC., ACCOMPANIED BY BELLA L. LINDEN, COPYRIGHT COUNSEL

Mr. KEATING. Well, you are very kind, Mr. Chairman.

This is my last gasp as a lawyer for the present, but I am delighted to be heard, and also appreciate your calling me a little bit out of order, because I am tied up in a lot of things at the present time.

This statement which I make is submitted on behalf of Macmillan, Inc., and Harcourt Brace Jovanovich, Inc., two of the five largest American publishers. And I wish to emphasize, however, as I did in the copyright law revision hearings before a subcommittee of the House Judiciary Committee, back in 1965, that I really consider my appearance to be a form of extension of my public service. I firmly believe that the promulgation of a revised copyright act which fails to adequately preserve and foster authorship and publishing would endanger vital national and public interests.

As I indicated, in 1965 I had the privilege of appearing before Subcommittee No. 3 of the Committee on the Judiciary of the House, at the very inception of the legislative stage of the program, I think, for the revision of the Copyright Act. There has been a lot of water over the dam since then, but that is my recollection.

In the ensuing years, much time and effort has been expended by members and staff of Congress and administrative agencies, by representatives of producers and users of intellectual and artistic works, by members of the copyright bar, and by other interested parties in the development of a revised copyright law which will be consistent with the constitutional premise on copyright in this new age of information technology. And I hope that I am participating now in the conclusory stages of that program.

May I take this opportunity in the first instance to applaud your committee's farsighted recommendation in providing for the establishment of a National Commission on New Technological Uses of Copyrighted Works under title II of S. 1361. Its proposed creation provides the necessary recognition that there are certain difficult and still developing issues of the relationship between copyright and the new technology which require thorough investigation rather than premature, and therefore, possibly injurious, solution through immediate legislation. I will have occasion to refer to that a little later again.

My statement will be directed toward two issues: (a) the treatment to be accorded photocopying under a revised copyright law, and (b) the question of a general educational exemption.

First, photocopying. As an outgrowth of the 1965 hearings in the House, in 1967 the House passed H.R. 2512, for general revision of the Copyright Act. Section 108 of the House act provided a limited exemption from copyright infringement in favor of nonprofit archival custodians. The exemption was restricted to the reproduction of unpublished works for purposes of preservation, security, or interarchive deposit. The propriety of unlicensed photocopying was otherwise left to the province of fair use, a flexible doctrine developed in the courts and codified in section 107 of the House act.

The version of the photocopying provision now before the Senate in section 108 of S. 1361 so extends the photocopying exemption that authors' and publishers' rights are eroded and in some areas, in practical effect, preempted. Specifically, section 108 of the Senate bill encompasses archival reproduction of published as well as unpublished, works for replacement purposes and, most significantly, allows both unpublished and published books and periodicals to be copied by libraries and archives at the request of a user of their collections.

Since all any user of a photocopying service may desire is one copy, and since each separate user would receive a separate copy of the same work, the end result, in the aggregate, would be the erosion of entire markets for certain books and periodicals and in many instances to make the publishing of a work simply uneconomical.

The effects of section 108 of the Senate bill on the interests of authors and publishers of books and periodicals are rather clear. As reprographic technology progresses, interlibrary affiliations grow and information transfer systems develop, educational and trade publishers are likely to find the economic realities of their businesses approaching prohibitiveness. Publishers of technical and reference works having small markets and modest profits to begin with will find the very function of their works—that is, piecemeal reference to particular portions rather than cover-to-cover reading—and hence their markets usurped by what cannot be described as anything but competitive on-demand publishing. Publishers of texts and other educational works will lose incentive to revise works or re-stock out-of-print books.

Organizations engaged in back issue services and authorized reprint houses will find their investments and very existence in doubt. Publishers of technical journals, faced with increasing production costs but unable to raise subscription prices because such increases are likely to be met by canceled subscriptions and reliance of the former subscriber on photocopies must sooner or later simply stop publishing. These are not mere specters or dramatics. They are inexorable conclusions drawn from the private enterprise system of our economy and the progress of technology.

Now, although we oppose much of section 108 of S. 1361 that goes beyond the archival provision of the House act, we are not oblivious to the fact that reprographic devices are here to stay and may perform valuable functions in research and education. We believe, however, that the operation of such devices must be brought within the copyright system in such manner as to assure the rights of publishers and the economic viability of their ventures.

We believe, moreover, that the appropriate bases for such resolution already exist in S. 1361—namely, in the fair use provision of section 107 and in the creation of a National Commission on New Technological Uses of Copyrighted Works under title II, to which I referred. The doctrine of fair use is suited to the issue of free reproduction in a developing technology; the frequent objection by libraries to its asserted vagueness is not persuasive in view of the general language of legal rules governing many aspects of life and business and, indeed, in view of the general criteria of commercial advantage, reasonable effort, normal price, commonly known sources and satisfaction established in the proposed extension of section 108 itself.

If there is reason why a justified amount of unauthorized photocopying cannot be accommodated within the framework of fair use, it remains to be demonstrated. Similarly, if our fears of the effects of unlicensed photocopying extending beyond fair use are unfounded, this has yet to be shown. The proposed National Commission would be well suited to these inquiries and to the formulation of alternative procedures which will serve all interests concerned.

There is little justification for the creation of particular photocopying provisions in a bill which allocates to the Commission the specific authority to "study and compile data on the . . . the reproduction and use of copyrighted works . . . by various forms of machine reproduction. . . ." I am, of course, not unfamiliar with the use of compromise in the legislative process. I have been subject to that myself on occasion.

I am concerned, however, that a compromise solution to the issue of photocopying at this point is likely to have the effect of freezing potentially detrimental measures into our laws for years to come and to remove any impetus for thorough consideration of this issue by the proposed National Commission. I do not believe the obverse to be true. In view of the admission of all concerned that photocopying is a subject worthy of further consideration, and in light of the specific mandate of the National Commission, I do not believe that library and allied interests will suffer materially from the omission of specific photocopying provisions in section 108 at this time.

I do not want to leave this issue of photocopying without briefly offering one additional comment on the issue of fair use. It has been reported that a draft version of this subcommittee's report on a predecessor of S. 1361 states in part that "the making of a single copy of an article in a periodical or a short excerpt from a book would normally be regarded as fair use." This has caused some persons to believe that the subcommittee intends a so-called single copy exemption to be applicable under all circumstances under the rubric of fair use.

I am convinced by the context of this statement that this subcommittee had no such intent and I urge that such an interpretation be expressly repudiated and that this language be clarified in the subcommittee's final report.

The inherent fallacy of the single-copy theory has been amply demonstrated in discussions before this subcommittee—after all, the publishers I represent here today are themselves engaged in publishing and selling one copy at a time to multiple users, as would the libraries under a photocopying exception—and the retention of the draft language as a part of the legislative history of the revision bill may have unfortunate and unintended results.

I do not propose to enter into any further analysis of the provisions of section 108 of the Senate bill. I would call the subcommittee's attention, however, to a paper dated October 12, 1972, and prepared by the firm of Linden & Deutsch, copyright counsel to Harcourt Brace Jovanovich, Inc., and Macmillan, Inc. This paper is annexed as exhibit A to the statement which I have delivered to the committee.

I endorse the analysis set forth therein and request that it be accepted as part of my statement. Mr. Linden will certainly be available to the subcommittee to answer any questions concerning this exhibit.

[There followed the testimony of Ambassador Keating which appears preceding the testimony of Mrs. Bella Linden during the testimony taken relating to the general educatioinal exemption.]

Mr. Keating. Mrs. Linden who is a far greater expert on the copyright laws than your witness, Mr. Chairman, is here to address herself to questions, either now or at the time when she testifies later this afternoon.

Senator McClellan. Very well.

Any questions, Senator?

Senator Burdick. No.

Senator McClellan. Senator Fong, any questions?

Senator Fong. No.

Senator McClellan. Thank you very much.

Do you want to make any statement at this time?

Mrs. Linden. No, Senator. I appreciate being heard this afternoon, when I am scheduled to be heard, and will make any comments at that time, if that is suitable.

Senator McClellan. All right.

Mr. Linden. Unless you wish for me to make one brief comment on the photocopying issue per se.

Senator McClellan. All right.

Mrs. Linden. I was particularly interested in Senator Burdick's and Senator Fong's inquiries with respect to the feasibility of compensating authors and publishers for photocopying, and specifically with respect to the inquiries about that little boy who wants to photocopy one page.

The system—the concept—of the educational market is one that suggests the product is prepared for use by students, researchers, adult students, by education, research and science generally. The system of compensation under the older technology to book publishers and magazine publishers was so well established that it caused no controversy at all. The new technology does present problems. They are not insurmountable.

I will refer this afternoon, when I am afforded the opportunity, to the Committee on Scientific and Technological Information under the aegis of the Federal Council for Science and Technology, which I have had the honor and pleasure of participating in.

It is abundantly clear that the very technology that makes photocopying necessary, desirable, feasible, and economically less costly than subscribing to chemical journals, or any journals—or perhaps, in the long run, even buying books and occupying bookshelves, space, with volumes that deteriorate, et cetera—that very technology has created and produced the answer to the problem it has caused.

It is feasible today under the present technology to monitor uses, to pay for uses. The Xerox Co. today, for one, has a system of monitoring pages reproduced by its Xerox machines. Certain of the devices that are capable of photocopying pages from books, not just loose pages, have a system whereby the machine itself monitors effectively whether a book page or loose piece of paper is photocopied.

I am certain that the National Commission, which you in your mature wisdom and knowledge of the legislative process have recommended in the proposed title II, can call upon the mathematicians, the scientists, and the hardware manufacturers who have the ability and the capacity to monitor uses, and a new system of compensation for photocopying uses can be made practical. With all due respect, I urge that it be left to the Commission to report to you so that appropriate action can be taken at that time.

Senator FONG. Mr. Chairman, I would like to commend our former colleague and Ambassador to India for his very excellent statement before this committee.

Mr. KEATING. Thank you.

Senator BURDICK. Could you submit to us sometime today or later a budget as to what one of these machines would cost and operation thereof?

Mrs. LINDEN. Senator Burdick, it does not require a separate machine. As a matter of——

Senator BURDICK. I mean the whole setup from beginning to end.

Mrs. LINDEN. I was going to suggest this afternoon—I would be glad to refer to it now. I was chairman of a subpanel of the Committee on Scientific and Technical Information of the Federal Council for Science and Technology. This issue did arise before that subpanel and our report dealt with exactly that matter. I called the committee's chairman yesterday morning and asked whether I could refer to the material prior to its public release.

The coauthors of this report had as disparate backgrounds as Commissioner Mary Gardner Jones, of the FTC, and Dr. John Weil, who is in charge of information systems development for Honeywell and General Electric in their joint project. Various interested administrative agencies, DOD, NASA, AEC, were also represented.

Our report was adopted without dissent. And our report clearly indicates the feasibility of monitoring uses and recording payment. The technology is there, exists, and will not cause a prohibitive addition to the per page cost of photocopying that is presently paid by users and libraries, adverted to this morning, and paid to the Xerox companies, to Honeywell to IBM, etc.

So it is feasible. It is practical, and work has been done.

Senator BURDICK. I would still like a budget.

Mrs. LINDEN. To the extent that the information is currently available, I will be delighted to submit it for August 10th.

[Exhibit A referred to by Ambassador Keating follows:]

EXHIBIT A

LIBRARY COPYING UNDER DOMESTIC COPYRIGHT LAW REVISION

I. THE LIBRARY COPYING PROVISION AS PASSED BY THE HOUSE OF REPRESENTATIVES

On April 11, 1967 the House of Representatives passed H.R. 2512 (90th Cong., 1st Sess.), an Act for General Revision of the Copyright Law. While Section 107 of this Act codified the general doctrine of "fair use" as it has been developed by the courts, Section 108 established a specific "limitation" on the rights of copyright owners in a carefully circumscribed area of library copying:

> § 108. Limitations on exclusive rights: Reproduction of works in archival collections.
>
> Notwithstanding the provisions of Section 106 [delineating the exclusive rights of copyright owners], it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution.

Section 108 was thus limited to (i) facsimile reproduction of unpublished works by certain nonprofit institutions, for (ii) their own limited purposes.

In approving this version of Section 108, the House Committee on the Judiciary stated that it did "not favor special fair use provisions dealing with the problems of library photocopying" other than under the circumstances abovedescribed. H.R. Rep. N. 83 (90th Cong., 1st Sess.) at 36 & 37. Similar sentiments were expressed by the Register of Copyrights. Thus, although the Copyright Office Preliminary Draft of the Revision Bill allowed libraries to make and supply single copies of periodical articles, or copies of entire published works considered to be unavailable from trade sources, upon request, the Register subsequently "became convinced that the provision would be a mistake"[1] in view of rapidly changing information technology.

The limited version of Section 108 set forth in H.R. 2512 is the only specific "library copying" provision to have received the formal approval of a Congressional Committee or either house of Congress.

II. THE LIBRARY COPYING PROVISION PRESENTLY BEFORE THE SENATE

The Copyright Revision Bill presently before the Senate Subcommittee on Patents, Trademarks and Copyrights [S. 644 (92nd Cong., 1st Sess.)], includes a much more extensive "library copying" provision in its version of Section 108. In brief, the "limitations" on the exclusive rights of copyright owners are extended to include (i) duplication of *published* works by certain public or semi-public institutions, at (ii) the request of *users* of the institution's collections.[2]

This extension of the specific "library copying exemption" was expressly disapproved by Resolution 38 of the Section of Patent, Trademark and Copyright Law of the American Bar Association in 1970:

> Resolved, that the Section of Patent, Trademark and Copyright Law disapproves in principle enactment of severe limits on the exclusive rights of copyright proprietors with respect to reproduction and distribution of copyright works by libraries and archives.

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[1] Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law at 26 (May 1965).

[2] The current Senate version of section 108 also extends the limitation of H.R. 2512 to include duplication of published works for the purpose of replacing "damaged, deteriorating, lost, or stolen" copies of works under certain circumstances.

Specifically, the Section of Patent, Trademark and Copyright Law disapproves Section 108 of the December 10, 1969 Committee Print of S. 543 (McClellan—91st Congress, First Session).[3]

III. ANALYSIS OF SECTION 108 OF S. 644

A. *Synopsis.*—Section 108 of the Copyright Law Revision Bill now before the Senate Subcommittee adopts the provision of the House Act allowing library and archival copying of unpublished works for the purposes of preservation, security or deposit in other institutions. However, the Senate Bill extends the library copying exemption to allow unlicensed facsimile reproduction of published works for the purposes of replacing deteriorating, lost or stolen copies if the institution has "after reasonable effort determined that an unused replacement cannot be obtained at a normal price" from certain sources.

The Senate Bill further extends the exemption to include unlicensed reproduction of published or unpublished books and periodicals[4] by libraries and archives at the request of a user of the institution's collections. This "user request" exemption is subject to the conditions that (a) the user must have "established to the satisfaction" of the institution that an unused copy cannot be obtained "at a normal price" from certain sources; (b) the reproduction must become the property of the requesting user and the institution must have had "no notice that copy would be used for any purpose other than private study, scholarship or research," and (c) the institution issues certain "warning" notices.

B. *Considerations.*—At this point our purpose is not to re-draft or rehabilitate the library copying provisions of S. 644. Our purpose is merely to isolate certain aspects of the proposed Senate version of Section 108 in order to allow examination of their impact on the business operations of interested parties. In this context, we believe the following considerations to be of principal significance:

(i) Section 108 condones *free* reproduction. It is *not* a "compulsory licensing" provision; no compensation to copyright owners—whether by statute, regulation, or otherwise—is contemplated. Similarly, the Section does not expressly require accurate reproduction, original source credit, or use of copyright notice on the reproductions.[5]

(ii) The provision allowing reproduction of published works for purposes of replacement and the "user request" exemption require some determination that unused copies are not obtainable. However, unavailability in fact is not required: in the case of replacement the library need only conclude that such is the case "after a reasonable effort," and in the case of copies made at a user's request the library need only be "satisfied," by the user, that such is the case. In the latter case, at least, there is no express requirement that the library's determination be in good faith, *nor is there any requirement that the requesting user make any actual effort to locate a copy, or give actual evidence thereof.*

Moreover, Section 108 provides no meaningful standards with respect to availability. In this respect we can only raise questions as to what circumstances may be sufficient to render a copy available or unavailable; may inability to secure a copy within "X" number of days render the copy unavailable; are there geographic limits on availability or the library's or user's efforts (is a work not available at the neighborhood bookstore unobtainable; how many bookstores should be checked; what types of sources other than bookstores are relevant sources for certain works?); does a new version of a work satisfy the availability conditions with respect to prior editions; should a work be considered available if it is included in a compilation or collection otherwise not needed by the library or user?

Even where Section 108 does attempt to give some definition of availability, it remains unclear or troublesome in operation. Thus, availability at announced or catalog prices does not preclude unlicensed copying; the library may still determine that the price is not "normal."[6] To preclude copying, the work must be available from "commonly known" trade sources; specialized sources for works of more esoteric disciplines may not qualify. Indeed, it is not clear to whom the source is to be "commonly known"—the library, the requesting user, the publisher, the "trade," or the courts? Certain sources are clearly insufficient, namely, those outside the United States. Thus, to preclude unlicensed copying, arrangements must be made for domestic availability of foreign publications, in any language, no matter how limited their normal market.

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[3] Section 108 of the Dec. 10, 1969, Committee Print of S. 543 is identical to the version of section 108 currently set forth in S. 644.

[4] This provision of S. 644 extends to all walks other than musical, pictorial, graphic, cinematographic, or audio visual works.

[5] We do not believe that any of these requirements will necessarily be deemed implicit in the requirement of "facsimile" reproduction of section 108 (b) and (c). In any event, the "user request" exemption of sec. 108(d) is not limited to "facsimile" reproductions.

[6] Sec. 108(c), (d) (1).

Similarly, the provision does not appear to have considered the particular problems raised by its application to back issues. Although a number of organizations have made great investments of time and cost in locating, accumulating, and storing back issues in specialized fields and servicing their clients, their efforts and investment are adversely affected if not completely ignored: (a) we doubt that many libraries will accurately estimate the "normality" of back-issue prices; and (b) one may question whether such suppliers will comprise "commonly-known" trade sources, particularly where inter-library requests may involve libraries which have had no knowledge or dealings with such specialized sources.

Availability on library loan or for in-library use also appears insufficient to preclude unlicensed copying at the request of a user. The references to "trade sources," "price," and "unused copy," and the fact that to make a copy the library must have a copy, or have access to one under inter-library affiliation, all seem to imply that a user may request and receive a copy of a work no matter how accessible such work may otherwise be for his use under loan, and regardless of the degree of inconvenience, if any, caused by such use being restricted to a certain location or for a certain time, or his having to wait for such access. In short, a user may even request and receive an unlicensed reproduction of all or part of a work which is available to him from his local library for home or business use for extended periods of time.

"Trade sources" are defined to include "authorized reproducing services";[7] "reprint houses" are presumably included but are not expressly mentioned.

There are no excuses for unavailability. Thus a work may be withdrawn by a publisher for revision, while his potential market is sapped by duplication of prior editions.

(iii) Section 108 does not require initial recourse to the copyright proprietor. That the proprietor may be willing to consent to the desired reproduction, even on "reasonable" terms, is rendered irrelevant since his permission need not be first requested. (The previously-discussed "availability" conditions do require some initial degree of unsuccessful recourse to trade sources for copies. Author-proprietors would generally not be considered "trade sources"; under various circumstances, this may also be true of publisher-proprietors. In any event, we believe that the condition of unabiliability which allows reproduction will be met where existing copies are considered unobtainable. Thus, a request for permission to create a *new* copy is not a condition precedent to free copying under the proposed law.)

Similarly, although Section 108 is apparently not intended to interfere with certain contractual arrangements between libraries and copyright owners,[8] there is no incentive to libraries to enter into such arrangements on even "reasonable" terms. Furthermore, the relevant subsection refers only to obligations assumed when the library "obtained [the] copy for its collections." Thus, agreements which may be entered into with respect to earlier-published works, such as "blanket" licenses covering a publisher's catalogue or subscribers, may be ignored by libraries if less favorable than the proposed law. Even with respect to new works, it may be questioned whether the language of the relevant sub-paragraph clearly indicates that more "difficult" contractual undertakings will prevail over contrary provisions of Section 108.

(iv) The "libraries" and "archives" entitled to invoke the exemptions of Section 108 are not restricted to nonprofit institutions.[9] So long as the particular act of reproduction in question is without purpose of "direct or indirect commercial advantage" [§ (a)(1)], even profit-making institutions may avail themselves of the provision. We do not believe that the quoted language was intended, or will be construed, to preclude the operation of photoduplication services by for-profit institutions in order to make their overall, profit-generating, services more attractive or competitive.

Nor are such "libraries" and "archives" limited to public institutions. The only restriction on the nature of the exempt institutions is the requirement that its collections be open to *at least* persons, other than affiliates of the institution,

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[7] Sec. 108 (c), (d)(1).

[8] Sec. 644, sec. 108(e)(3): "Nothing in this section . . . in any way affects . . . any contractual obligations assumed by the library or archives when it obtained a copy or phonorecord of the work for its collection."

[9] In this respect, the Senate version of sec. 108 goes beyond the House act even with respect to archival reproduction of unpublished works.

"doing research on a specialized field." It would appear that many corporate collections will qualify, or can be made to do so with little effort or burden.

In a similar vein, there is no effective restriction on the "users" entitled to receive unauthorized reproductions under the "user-request" exemption. *Any* "user of the collections" of the institution qualifies, including users making their request "through another library or archives." As inter-library affiliation and "information networks" grow, the way is paved for single-copy purchase to satisfy public requirements.

Section 108(d)(1) does require that "the library or archives has had no notice that the [requested] copy would be used for any purpose other than private study, scholarship or research." This does not impose any effective limitation on the nature of the user. Since there is no requirement that the library make any *inquiry* as to the purposes for which the copy is to be used, the condition is met by silence and is meaningless. Similarly, there is no limitation to any type of curricular or systematic instructional base for the private study. Again, the condition is rendered meaningless. Also, it is not clear that it is the "study, scholarship or research" of the requesting user which is to be served. We do not believe that the word "private" negates the possibility of even single-copy photocopying for group or successive uses.[10]

(v) Section 108 is not restricted to the reproduction of portions or excerpts of works; entire works may be reproduced without consent or compensation.

Nor is Section 108 entirely clear with respect to the manner of permitted reproduction (e.g., microform, recording, light and laser techniques, etc.). Thus, while the archival exemptions of Section 108 (b) and (c) refer to "copies" and "phonorecords" duplicated in "facsimile" form, the user-request exemption of paragraph (d) applies only to "copies" and does not limit itself to "facsimile" reproduction.

Nor does Section 108 generally restrict the nature or subject matter of works subject to reproduction. *All types* of unpublished works are subject to archival reproduction for purposes of preservation, security or deposit; and *all types* of published works are subject to reproduction for purposes of replacement. The "user-request" exemption of Section 108(d) is generally limited to textual books, periodicals and sound recordings; however, there is no limitation on the subject matter of qualifying books, periodicals, and recordings. Thus, novels, plays, poetry, textbooks, technical publications, encyclopedias and reference works, abstracts, etc. are all subject to partial or entire reproduction under the same standards.[11]

Section 108(d) does refer to the reproduction and distribution of "no more than one copy or phonorecord" of a work. However, paragraph (f) makes it clear that this does not preclude multiple reproduction of the same work except where the library "is aware or has substantial reason to believe" that it is engaging in "related" or "concerted" activity. Experience in various areas of law has amply demonstrated the difficulty of imputing knowledge as a basis of liability. Moreover, in many cases there may be no reason for libraries to suspect concerted activity, particularly since they have no duty of inquiry. To a great extent paragraph (f) is an asknowledgment that Section 108 condones on-demand *publishing* of works by persons other than the copyright proprietor.

(vi) In a number of respects, Section 108 is poorly drafted in such manner as to create the potential for unfortunate interpretation or application. For example: The ability of a library to engage in unauthorized reproduction is consistently referred to as a "*right* of reproduction and distribtuion" [§ 108(b) (c) & (d) (1)]. This will invite the courts to resolve issues regarding library photocopying by the traditional judicial practice of "*balancing competing* rights" (herein, "rights" of proprietors and libraries); on the contrary we believe that such issues should be resolved by *strict construction* of *limitations* on the *rights of copyright owners.*

§ 108(a)(1) requires that the library's "reproduction *or* distribution" be without purpose of commercial advantage. Where distribution as well as reproduction are involved, such as under the "user-request" exemption or inter-library application of the archival reproduction exemptions, both reproduction *and* distribution should be without such purpose.

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[10] Nor do we believe the sec. 108(d)(2) condition that the "copy become the property of the user" to bar such uses.

[11] As indicated earlier, we do not believe the reference to the "private study, scholarship or research" purpose of the user to be an effective limitation on users. For similar reasons, we do not believe it offers any meaningful restriction on the nature or subject matter of reproducible works.

§ 108(a), preceding subparagraphs (1) and (2), uses the phrase "and if." The "and" is, at the least, superfluous; and more significantly, it may create doubt as to the *cumulative* nature of Section 108.

The foregoing are merely intended as examples of poor draftsmanship having potential substantive effect on the principles embodied in the Section. As noted earlier, we urge that such principles themselves be subjected to examination and evaluation.

IV. CONCLUSION

Title II of the Senate Revision Bill would establish a "National Commission on New Technological Uses of Copyrighted Works." One of the stated purposes of the Commission is to "study and compile data on (1) the reproduction and use of copyrighted works . . . by various forms of machine reproduction . . ."[12] It is surprising that provisions for library copying which will seriously impair proprietary rights would be considered without the proper investigation which the Senate itself called for in appending title II to the Revision Bill.

Senator McCLELLAN. Very well.

Call the next witness.

Mr. BRENNAN. The Association of American University Presses. You have been allocated 5 minutes.

Senator McCLELLAN. All right.

Mr. BRENNAN. Would you identify yourself, Mr. Rosenthal?

STATEMENT OF ARTHUR J. ROSENTHAL, CHAIRMAN, COMMITTEE ON COPYRIGHT, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.; ACCOMPANIED BY JOHN B. PUTNAM, EXECUTIVE DIRECTOR, ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.

Mr. ROSENTHAL. I am Arthur J. Rosenthal, director of the Harvard University Press. I represent the Association of American University Presses in my capacity as chairman of that organization's Committee on Copyright. I do not speak for Harvard University.

With me on my right is Mr. Sanford C. Thatcher, social science editor of Princeton University Press, a member of our Copyright Committee and on my left, Mr. John B. Putnam. Mr. Putnam is executive director of the association.

The 64 university presses of the country are, I believe, in a fortunate position in helping to assess where the public interest lies in the problem you are studying this morning. We live in the world of the librarian. In Cambridge, my press, for example, is surrounded by no less than 89 Harvard libraries.

Our day-to-day work is almost exclusively with scholars and educators; yet, the necessity to protect each scholarly book and journal we publish is as real for us as it is for the most commercial of commercial publishers.

I hope that this special perspective will cause our testimony to be without any note of special pleading and will be regarded as cooperative and flexible by our library and educational colleagues.

In a very real sense, the university press bears a primary responsibility for dissemination of scholarship in this country; although their dollar volume is low, our members publish nearly half of the nonfiction books addressed to a scholarly audience that are issued each year.

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[12] S. 644, title II, sec. 201(b)(1)(B).

If the orderly reporting of such research is to continue, the medium through which it occurs must be protected, and the author's claim to the copyright of his own work must be safeguarded. Toward this end, our suggested rewording of section 107 is an attempt at precision in the critical area of fair use. We believe that the present vagueness of this section could be construed as an invitation to unlimited photocopying of copyrighted material and that our suggested rewording gives added structure to the meaning of this section.

Senator McClellan. Do you have any proposed language?

Mr. Rosenthal. I do. I have been skipping fairly rapidly, Mr. Chairman.

Senator McClellan. Is it in your prepared statement?

Mr. Rosenthal. It is.

Mr. Thatcher will continue our testimony.

Mr. Thatcher. Mr. Chairman, in our prepared statement we have referred in a general way to the threat to nonprofit publishing we perceive in passage of a bill amended in other ways than we propose, but in these supplementary remarks, I should like to direct particular attention to the plight of the one form of such publishing that is apt to be most endangered by the photocopying privileges sought by educators and librarians—the publication of scholarly journals, in which university presses happen to be heavily engaged (collectively publishing 280 journals).

There is no single medium more responsible for the advancement of knowledge and the dissemination of information than the scholarly journal. Its contribution is perhaps most conspicuous in the natural sciences where the rate of progress and the collaborative nature of the enterprise make the production of books by individual authors the exceptional, rather than the normal, form of publication. But its prominence in the natural sciences should not obscure the vital role the scholarly journal plays also in the humanities and social sciences. There, too, although it is more often the outstanding book that establishes a scholar's reputation than a series of articles, most such books could never have been written but for the essential groundwork that had been laid previously by dozens of articles on aspects of the topic treated. Take a look at the bibliography of practically any university press book, and you will immediately realize the truth of this assertion. The truly original work of scholarship, like the revolutionary discovery in science, is a rare phenomenon.

Yet for all their universally recognized value to the advancement of scholarship—indeed, their indispensable contribution—scholarly journals seldom pay their own way through income received from subscriptions and advertising, at least for a very long time after publication is initiated and sometimes never. A case in point is World Politics, a leading journal in the field of international relations that my press publishes at Princeton: it began to break even only after 9 years of publication at a loss. The situation is such that many journals have to be subsidized or supported in other ways by professional associations or research institutions, whose own funds for publication are usually quite limited. Outside help from other sources is difficult to find. Foundations and Government agencies, which have over the years been very generous in providing funds for the scholar's research activities, have traditionally shied away from extending that support to its logical conclusion by assisting the journals that publish the results of his research.

It is no solution to sell the journal at a price that will insure its economic viability, however high the price may have to be. For, unlike a book, which as a more or less unified treatment of a single subject can be sold even at a high price to those individuals who have a special professional interest in it, a journal typically provides a general forum for the discussion of a range of diverse issues within a broad field of inquiry, not all of which are likely to be of interest to the scholar who subscribes to it; hence, raising the price of the subscription is apt to make the alternative of photocopying those articles of particular interest to the professional relatively more attractive than continuing his subscription.

And here is the rub, as far as publishers of specialized journals are concerned. For as the cost of printing and publishing inexorably rise, and the charges for photo reproduction increasingly become cheaper, the journal publisher finds himself unable to pass on the higher costs to the consumer, who at some point on the scale will prefer photocopying to subscribing. The final result, if carried to its logical end, of course is self-defeating: the erosion of the journal's subscription list will sooner or later compel the publisher to cease publication of the journal altogether—and then the scholar will have nothing to copy. The publisher, the scholar, and the rest of us will all be poorer as a result.

It is this unhappy situation which I believe passage of S. 1361 with sections 107 and 108, unamended—or as amended in the ways educators and librarians desire—would bring even closer to reality than it already is because it would provide legal sanction for activities directly detrimental to the continued viability of scholarly journal publishing, activities which are now limited partly, I am sure, by the uncertainty which exists about their legal status. Allowing uncompensated use of copyrighted materials, as envisaged explicitly in the library amendment and the educational exemption, would ultimately dry up the very wellsprings of creative and productive scholarship which it is the concern of educators and librarians themselves to promote. They cannot have it both ways: eating their cake and having it, too.

What needs to be done, I want to suggest, is to find some practical means of implementing the principle that fairness most clearly dictates: that the user of copyrighted material, when the use involves more than fair use as traditionally understood, should bear some of the cost of its production. Photocopying is here to stay, and nothing that educators, librarians, or publishers decide is going to change that fact. Realistically, then, our efforts should be concentrated on devising workable mechanisms for linking up photocopying in support of original publication, rather than permitting it to remain a free rider, a parasitical form of publishing.

To explore alternative mechanisms, to see how the costs of producing and disseminating knowledge can be most equitably distributed among the parties concerned, users as well as producers, would be a fit task for the proposed National Commission to carry out, for only it will be in the position of judging impartially on the basis of information independently gathered what is in the best interest of the Nation as a whole.

In the meantime, it would seem best to proceed with caution, safeguarding rights that have long been recognized as vital to the creation and distribution of knowledge and not giving in to immediate pressures however forcefully applied. We of the AAUP believe that our proposed amendments to sections 107 and 108 would insure the maximum protection to these rights while providing the incentive needed to promote serious investigation of schemes for licensing the reproduction of copyrighted materials—incentive hitherto lacking because of the expectation that something—namely, free photocopying—can be gotten for nothing. It is a position we hope you will support. Thank you.

Senator McClellan. Very well. Thank you.

Thank you very much, gentlemen.

Now, we are going to recess until 1:30, and we urge those of you who are scheduled to testify this afternoon to be present so we will not have to wait on anyone.

[Whereupon, at 12:27 p.m., the committee recessed to reconvene the same day at 1:30 p.m.]

[The prepared statement of Arthur J. Rosenthal follows:]

Statement of Arthur J. Rosenthal, on Behalf of the Association of American University Presses, Inc., on S. 1361

I am Arthur J. Rosenthal, Director of Harvard University Press, a department of Harvard University engaged in not-for-profit publishing of scholarly books and journals. I represent the Association of American University Presses, Inc., in my capacity as Chairman of that organization's Committee on Copyright. With me are Mr. Sanford Thatcher, Social Science Editor of Princeton University Press and a member of AAUP's Copyright Committee, and Mr. John B. Putnam, Executive Director of the Association of American University Presses, Inc.

AAUP is a not-for-profit educational corporation operating in the interests of its membership, comprising 64 scholarly university publishers which are either departments of their respective parent institutions or wholly owned corporations thereof. All are engaged in the not-for-profit publication of works of scholarly distinction. Although AAUP's members together constitute something less than 5% of the dollar volume of books published in the United States, the titles they publish constitute a substantial portion—nearly half—of the serious non-fiction titles published for scholarly readers. This disproportionate balance of income to number of titles published is a measure of the commitment of the university Presses of this country to the dissemination of valuable but economically unprofitable scholarly books.

We appreciate this opportunity to present our views on certain specific aspects of S. 1361 and proposed amendments thereto, particularly since the university press community has not previously participated in the hearings relating to this important piece of legislation. Allow me, therefore, to state our position in brief:

1. We propose a substitute for section 107, as set forth in Exhibit A.
2. We oppose the proposed library amendment to section 108(d)(1).
3. We oppose the proposed "educational exemption" which will be discussed at a later session of these hearings.
4. We wish to associate ourselves, with certain reservations, with the position of the Association of American Publishers in respect of Section 108.
5. We support enactment of S. 1361, with sections 107 and 108 amended as indicated elsewhere in this testimony.

The university press in the United States has traditionally occupied a unique position between the worlds of commerce and scholarship. In fulfilling their responsibility to publish books by and for scholars that would not otherwise be published by reason of their limited marketability, the university presses of this country find themselves actively engaged in the world of business, buying goods and services, selling books and rights thereto, and otherwise fulfilling all the functions of a profit-oriented business, while at the same time maintaining a paramount interest in the editorial and scholarly integrity of their respective institutional imprints, and, hence, reputations.

It is this unique perspective that allows—or obliges—the university press to view the issue of copyright in general and of library photocopying in particular from the viewpoints of both educator and entrepreneur. The university press has always existed to insure the systematic and orderly transfer of important scholarly information to an appropriate readership, and to act as a faithful steward of its authors' rights and interests in doing so. The scholar is, after all, not only the reader-consumer, but the author-creator as well. Had he the time and resources, he would undertake to transfer his intellectual offerings directly to those who want and need them; since he usually has neither, the publisher—in the case of unprofitable scholarship, the university press—has provided the vital link between producer and user. If the orderly reporting of scholarly research and thought is to continue, the medium through which it occurs must be safeguarded. A vital component of that medium is the traditional privilege and responsibility of registering and protecting an author's claim to copyright in the writings which represent his intellectual achievement, and of exercising and managing all subsidiary rights depending on that copyright in accordance with contractual conditions agreed upon by author and publisher. This component—the responsibility of stewardship—is gravely threatened by the present vagueness of section 107, which is in effect an invitation to undertake unlimited photocopying of copyrighted materials with impunity. Accordingly, we therefore respectfully submit that section 107 be amended as set forth in Exhibit A appended to this testimony, in order to set more specific guidelines for the photocopying of materials in copyright.

It is not, and never has been, the position of the university presses that photocopying for library use is to be prohibited. Indeed, to the contrary, scholarly publishers have long recognized the value, in certain specific circumstances, of the photocopy as a means of assuring further distribution of their works amongst their readerships. Scholarly presses are sympathetic to the growing need for library materials and the shrinking resources with which libraries must seek to satisfy this need. At the same time, it is manifest that the increasingly prevalent practice of systematic library photocopying, in which works are reproduced in their entirety for distribution to multiple users, poses a grave threat both to the integrity of the copyright in the works copied, and to the proprietors—in this case university publishers—who have invested considerable financial and human resources in their production and publication. The present draft of 108 contains the minimum conditions necessary to assure reasonable protection of authors and publishers with regard to copyright; even these minima place strong emphasis on the intent of the library and educational communities to observe them in good faith. Indeed, to invoke the necessary means to assure compliance—particularly in regard to such provisions as 108(d)(1)—would be economically and practically unfeasible. Moreover, these conditions are entirely dependent on the amendment of section 107 I have suggested elsewhere in this testimony, which would give more structure to the circumstances under which limited photocopying of copyrighted materials might be undertaken. Failing such an amendment of 107, AAUP would be forced to argue strongly for revision of section 108 to allow photocopying of archival materials only.

In a field of endeavor where little if any financial reward accrues to the creator, every effort must be made to assure at least that he retains control over the format and content of his creation. Without copyright, this is impossible, and without adequate protection, there is no copyright. Our purpose as stewards of scholarship is to protect the environment in which authorship happens, for without the author, there is nothing to publish, and when nothing is published, there is nothing to read, and when there is nothing to read, the intellectual environment stagnates and ultimately dies.

With regard to the proposed educational exemption, let me once more invoke the dual perspective of the university press, in noting that the long-range interests of scholarship are assuredly ill-served by this proposed amendment. Its provisions are indeed so imprecise and subject to manipulation as to render virtually all copyright material void of any protection against unlimited photocopying.

In the event that S. 1361 cannot be enacted with the changes we have proposed, we would favor the referral of the entire question of library photocopying to the National Commission on New Technological Use of Copyrighted Works proposed in Title II.

[EXHIBIT A]

SUBSTITUTE SECTION 107 TO S. 1361 PROPOSED BY THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. JULY 31, 1973

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies of photo-records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, display or lecture in teaching, scholarship, or research, is not an infringement of copyright. Fair use does not include the reproduction of a copyrighted work for its own sake, as in an anthology or book of readings, or as a self-contained unit such as an appendix to another work, or as a substantial part of the text of another work. In determining whether the use of a work in any particular case is a fair use the principal factors to be considered shall be the market value of the use of the copyrighted work and the effect of the use upon the potential market of the work. Factors in making this determination shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work; and

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole.

AFTERNOON SESSION

Senator MCCLELLAN. The committee will come to order.

Mr. BRENNAN. The Association of American Publishers, Inc., has been allocated 3 minutes, Mr. Chairman.

STATEMENT OF W. BRADFORD WILEY, CHAIRMAN OF THE COPYRIGHT COMMITTEE, APPEARING ON BEHALF OF THE AMERICAN ASSOCIATION OF PUBLISHERS, INC.: ACCOMPANIED BY ROSS SACKETT, CHAIRMAN, ASSOCIATION OF AMERICAN PUBLISHERS, INC.; AND CHARLES H. LIEB, COPYRIGHT COUNSEL

Mr. WILEY. Mr. Chairman, I am Bradford Wiley, chairman and chief executive officer of John Wiley and Sons, Inc., New York, publishers of textbooks, reference books, and encyclopedias, journals and audio-visual materials. In behalf of the Association of American Publishers, Inc., I have submitted a full statement from which this oral presentation is abstracted. With me are, on my right, Ross Sackett, chairman of the association, and, on my left, Charles H. Lieb, our copyright counsel.

Our position on library photocopying was stated in our December 5, 1972, letter to Mr. Brennan in response to his request. Our position, in brief, is:

1. We support section 107.
2. We support section 108, but only with drafting changes.
3. We oppose a substitute for section 108(d)(1).
4. We oppose the overlapping "limited educational exemption" offered by the NEA Ad Hoc Committee.
5. We support the enactment of S. 1361 in its present form except for drafting changes which we have suggested.

AAP does not dispute the need for libraries in given instances to make photocopies of journal articles and some book reference materials.

I wish to emphasize, however, accepting as we do section 107 as a codification of the principles of fair use, we have offered in the past and continue to offer to collaborate with the library associations to establish clarifying guidelines.

As to copying that would go beyond fair use and would not be permitted by the library copying provisions of section 108 as presently drafted, we have offered before and continue to offer cooperation with the library associations to establish workable clearance procedures.

There is no need, therefore, for the library amendment and we oppose its adoption.

Section 108 with the drafting changes which we have suggested goes as far toward compromise in statutory form as publishers can go. The section, from our point of view, is troublesome. With the library amendment, it would become intolerable.

Thank you for the opportunity to appear before you.

Senator McClellan. Thank you very much.

[The prepared statement of W. Bradford Wiley follows:]

Prepared Statement on S. 1361, in Behalf of the Association of American Publishers, Inc.

I am W. Bradford Wiley, Chairman and Chief Executive of John Wiley & Sons, Inc., publishers. I appear in behalf of the Association of American Publishers, Inc. of which I was formerly Chairman and am now Chairman of its Copyright Committee. With me are Ross Sackett, President of Encyclopedia Britannica Educational Corporation, and present Chairman of AAP; Richard P. Sernett, Secretary and Chief Legal Officer of Scott, Foresman and Company, Vice Chairman of the AAP Copyright Committee; and Charles H. Lieb of the New York Bar, Copyright Counsel to AAP.

AAP is a trade association of book publishers in the United States. Its 260 member companies and subsidiaries are believed to produce 80% or more of the dollar volume of books published in the United States. Some of its members publish scientific and technical journals. Although most of its members are in the private sector, some are religious and educational not-for-profit organizations.

We are grateful for permission to testify at what we understand are limited hearings confined to specific issues, one of which, library photocopying, is the subject of the present discussion.

AAP'S POSITION

We stated our position on library photocopying in response to the Subcommittee's request in our letter of December 5, 1972 to Mr. Thomas C. Brennan, your Chief Counsel, a copy of which marked "Exhibit A" is attached. The library "substitute amendment" to which we referred in that letter is, we beileve, the amendment to S. 1361 which the Association of Research Libraries and the American Library Association are presently supporting. The drafting changes to Section 108 of S. 1361 (then S. 644) which we suggested in that letter are those outlined in "Exhibit B" attached hereto.

Our position, in brief, is as follows:

(1) We support Section 107 as a helpful statement of the principles of fair use.

(2) Although in some respects harmful to the interests of copyright proprietors, we support Section 108 but only with drafting changes as outlined in Exhibit B.

(3) We oppose the substitute for Section 108(d)(1) requested by the library associations.

(4) We oppose the overlapping "limited educational exemption" amendment offered by the National Education Association Ad Hoc Committee on Copyright Law Revision which is to be discussed at a later session in these hearings.

(5) We support enactment of S. 1361 in its present form except for the drafting changes to Section 108 referred to above.

The membership of AAP, profit and not-for-profit alike, have a vital interest in protecting their publishing investments against unauthorized library photocopying or periodical articles and contributions to collective works. George D. Cary, then Register of Copyrights, succinctly stated the basis for our objection in a recent address. He said "unlimited copying * * * could well so diminish sales that the journal publisher would have to suspend publication, or increase the cost of the journal in order to make up for the loss in subscriptions caused by the excessive copying." (ASIS Proceedings, Vol. 9, 1972, at 171.)

AAP does not dispute the need for libraries in given instances to make single photocopies of journal articles. It does dispute that the amendment offered by the library associations provides the proper method.

AAP'S OFFER TO ESTABISH FAIR USE GUIDELINES

Much of what libraries copy they have the right to copy within the principles of fair use, which would be codified by Section 107. Concededly the line that marks the difference between fair and unfair use in a given case may be difficult to draw. Because we understand the predicament in which this places the librarian we have offered to cooperate with the library associations in establishing quantitative and qualitative guidelines which would eliminate much of the present uncertainty. So far, however, the library associations have not chosen to accept our offer.

GUARANTEED ACCESS TO THE USER

Much also of what libraries copy, clearly not fair use, would be permitted to copy under subsection (b), (c) and (d) of Section 108, both as presently drafted and as amended as suggested in our Exhibit B. These subsections would permit single copying not only for archival purposes but also for the requesting user if he cannot obtain the published work from the publisher or dealer or a reprint or photocopying from an authorized reproducing source. Thus, user access would be guaranteed to any work, whether in or out of print.

AAP'S OFFER TO ESTABLISH CLEARANCE PROCEDURES

We share the view that we understand was stated in the Committee's draft of Report to accompany S. [illegible] (which was not issued) that the interest of the library community in satisfying existing needs of scholarship and research is adequately provided for in Sections 107 and 108 and that further innovations in reprography policy should await either agreement among the parties or the studies of the National Commission to be appointed under Title II. For our part, we, with the Authors League, members of the Association of American University Presses, several learned societies which publish journals, and the American Business Press, have offered to cooperate with library and other interests to establish workable voluntary arrangements to clear the photocopying of material that would exceed the limits imposed by Section 108 (cf Exhibit A).

The library associations (other than the Special Libraries Association which has recently announced its willingness to work out arrangements to assure access to library resource on reasonable terms) have rejected our proposal, and offer instead a substitute subsection 108(d)(1) which would permit not only the kinds of copying contemplated by Section 108 as presently drafted but also the copying of an entire article in a periodical issue or of an entire contribution to a collective work.

We think this kind of broad-axe indiscriminate treatment of the difficult photocopying issue is a poor substitute for mutually acceptable voluntary arrangements; that it would be ill-advised and counter-productive and, as Mr. Cary noted, could lead to the ultimate disappearance of the very periodicals and collective works which the libraries want to copy.

AAP'S OBJECTIONS TO THE LIBRARY AMENDMENT

We oppose the amendment offered by the library associations. Totally overlooked in their approach are basic differences and distinctions that exist between the kinds of material copied and their varying markets, the kinds of institutions which do the copying and the manner in which they distribute it. Below are a few examples of the distinctions which we have in mind.

(1) The library amendment would ignore the nature and purpose of the work, and would treat in the same manner a work prepared primarily for scientific or educational purposes and an article in a news magazine of current interest only.

(2) It would ignore the cost and effort involved in the creation of the work and the size of its anticipated market and readership.

(3) It would ignore the nature of the library that does the copying, treating in the same manner a small general purpose library with local patronage and a

central research library serving a broad geographical area, possibly even crossing national boundaries to form part of a worldwide network.

(4) It draws no distinction between the sporadic over-the-desk delivery of a conventional photocopy and the systematic facsimile transmission of the work by telephone line, cable or over the air.

(5) It takes no account of whether copies of the work are available to the library or the user from the publisher or his authorized reproducing service, and makes no distinction between current and older issues.

NO "NORMAL" FAIR USE

Basically the vice in the library amendment is that it draws no distinction between the kinds of single copying which can be justified under the principles of fair use as stated in Section 107 and the kinds which cannot be so justified. We understand that the draft of the Committee Report which was under consideration in 1969 would have overlooked this distinction and incorrectly, in our opinion, stated that "the making of a single copy of an article or periodical * * * would normally be regarded as fair use." There is no "normal" article, nor "normal" kind of copying or use, and there cannot therefore be an accurate generalization as to what normally would be fair use without at the same time taking into account the nature of the work and its use and the other criteria summarized in Section 107.

Periodical articles and contributions to collective works cannot be treated generically. The library copying of an article translated from the Chinese at a cost of thousands of dollars and with readership limited to a few cannot be fitted into the same pattern as the library copying of an article in a news magazine. Similarly, the systematic distribution of copies through a national or international library network should not be treated in the same manner as the occasional delivery of a copy to a local patron.

SUMMARY AND CONCLUSION

We recognize the need for workable clearance procedures. By their very nature, however, they should be established by mutual agreement, not unilaterally or by statutory fiat. We have offered before and offer again to cooperate with the library associations in working out the necessary arrangements. We hope, in any event, to pursue this path with the Special Libraries Association and with any other group which may wish to participate.

Section 108 with the drafting changes suggested by us goes as far toward compromise in statutory form as publishers can go. The section, from our point of view, is troublesome. With the library amendment it would become intolerable. We urge therefore

(1) that the library substitute amendment be rejected;

(2) that Section 107 and Section 108 with our suggested changes be approved;

(3) and that as presently provided in the bill, the remaining open questions relating to library photocopying be left for study by the National Commission.

Thank you for the opportunity to appear before your subcommittee.

ASSOCIATION OF AMERICAN PUBLISHERS, INC.,
New York, N.Y., December 5, 1972.

MR. THOMAS C. BRENNAN, Esq.,
Chief Counsel, Committee on Patents, Trademarks, and Copyright, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. BRENNAN: This is in response to your letter of September 19, 1972, in which you invited the views of the Association of American Publishers, Inc., on the library photocopying issue.

As we understand it, Section 108 was added to S. 644 by the subcommittee in an effort "to supplement the general fair use provisions contained in Section 107." [1] This was presumably done in response to library demands for a reproduction privilege including the right to copy an entire journal article on request by a patron.

Section 108 is harmful in some respects to the interests of publishers and their authors. In some respects, too, the section has technical flaws. Nevertheless, if the section were acceptable without substantive change to all of the other interested parties. AAP, with appropriate technical clarification, would support it also. We understand, however, that Section 108 in its present form is not acceptable either to the American Library Association or the Association of Research Libraries.

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[1] Your letter of September 19 1972.

EXHIBIT A

In an effort to reach a fair and reasonable solution, representatives of AAP and the Authors League initiated a series of meetings, to which you referred in your letter. Those attending, in addition to the Authors League and AAP, included representatives of ALA, ARL, the Association of American University Presses, Inc., American Business Press, Inc., of learned societies which publish many scientific and technical journals, and of industry-connected research libraries and information centers.

At the request of the library interests, the group confined its attention to library photocopying of scientific and technical journal articles. In September, 1972, acting upon a proposal by one of the library representatives, a consensus was reached that libraries should have the right to reproduce single copies of articles in such journals but only if copies are not available within a reasonable time and at a reasonable price from the publisher or his authorized reproducing service.

An amendment to the effect was thereupon drafted by the lawyers in the group representing ALA, AAP and the Authors League. Before any of the other groups could take formal action, however, ALA and ARL flatly rejected the draft amendment without identifying in what respects the draft was not acceptable, without offering any changes for terms they might have found objectionable, and without offering any alternative solutions.

We understand that ALA and ARL are unilaterally proposing a "substitute amendment," [2] which we oppose as totally unsatisfactory. We sincerely regret that ALA and ARL apparently have abandoned efforts to achieve a consensus with other interested parties on the library photocopying issue and, instead, have chosen to pursue an adversary position before Congress.

Under these circumstances we respectfully suggest when the Copyright Revision Bill is reintroduced in the 93rd Congress,

A. that apart from technical drafting changes, Section 108 in S. 644 remain unchanged or, in the alternative,

B. that Section 108 in S. 644 be deleted and Section 108 of H.R. 2512 be inserted in its place, and that Section 117 of S. 644 be revised by appropriate amendment so that the remaining library photocopying issues be left for solution by the courts and the proposed National Commission on New Technological Uses of Copyrighted Works.

Section 107 of S. 644, as we understand it, is intended to state without change the principles of fair use as they exist today and, if that understanding of the legislative intent is correct, we support the section.

As always, we support your efforts to bring about the prompt enactment of a sound copyright revision bill.

Sincerely,

CHARLES H. LIEB,
Copyright Counsel, Association of American Publishers, Inc.

ANNEX TO STATEMENT OF AAP ON LIBRARY PHOTOCOPYING, S. 1361

SUGGESTED CHANGES TO SECTION 108

Section 108(a)—Line 7—eliminate "and."

Section 108 (b), (c), (d), (e)(3), (f)—

The phrase "the right" or "the rights" of reproduction and duplication is improperly used in these subsections. The Section should not refer to "rights." Rather, as indicated in the title of Section 108, and of Section 107 as well, the permitted copying and distribution are "limitations" on the exclusive rights of the *owner* of the copyright. These subsections therefore should state that the kinds of reproduction and distribution referred to therein "are not infringements of copyright" and the reference to "rights" should be eliminated.

Section 108 (c), (d)—

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[2] ARL Newsletter, No. 58, November 14, 1972

The "availability" portions of 108 (c) and (d) should be amended to read

"* * * that an unused copy cannot be obtained at a *reasonable* price from commonly know trade sources in the United States *or the publisher* or other copyright owner or an authorized reproducing service."

Section 108(e)(3)—Lines 16 and 17—should be changed to read

"* * * assumed *at any time* by the library or archives with respect to any copy or phonorecord of *a work in* its collections."

A new subdivision should be added, possibly as subdivision (3) of Section 108(a) to require that the appropriate copyright notice be included in any copy or phonorecord made in Section 108.

Section 108 and perhaps Section 107 as well should specifically state that the reproduction of copies of consumable works such as work book exercises, problems, or standardized tests and answer sheets and of works used for purpose of compilation are not permitted fair uses.

Senator McClellan. Call the next witness.

Mr. Brennan. The American Business Press Association.

STATEMENT OF ROBERT A. SALTZSTEIN, GENERAL COUNSEL, ON BEHALF OF THE AMERICAN BUSINESS PRESS, INC.

Mr. Saltzstein. Mr. Chairman, my name is Robert Saltzstein. I am general counsel of American Business Press.

We have submitted a statement for the record, and I would like to enter that into the record.

I suppose one of the advantages of coming toward the end of a very interesting discussion is perhaps we can help come to a solution, which is going to be the purpose of my presentation.

Senator McClellan. Very well. Your statement will be printed in full in the record. If you wish to highlight it, you may do so, or supplement it in any way you like.

Mr. Saltzstein. Thank you, Mr. Chairman.

Basically American Business Press is composed of approximately 500 specialized business publications, many of whom are scientific and technical publications. Whatever the American Chemical Society and the American Association for University Presses said we would have to endorse fully because if copyrights are vital to their viability, they are extremely vital to the viability of the taxpaying organizations which make up the American Business Press. Now matched with our concern for proprietary rights, which is basically the right of copyright, which has really caused the business press, the scientific business press in this country to grow, is our concern for the dissemination of information.

We can't stop the inexorable onrush of photocopying, but we are obligated to do what we can to cut down its invasion on our ability, if you please, to keep on disseminating this information.

Now we think that the statute before you, the bill before you, has the seeds of an effective compromise in it. Section 107, we think is a fine proviso and should stay in the law. It is a statutory rendition of the fair use concept. Section 108, we have reservations about. If that could be referred to the committee or the commission set up under title 2, perhaps some of the electronic marvels of the age as were very ably postulated this morning, could be fully explored. But in the meantime, that part of the bill, section 504(c)(2) which preserves and safeguards librarians from suit, is a protection providing all that is necessary. It appears on page 55 and in our opinion is all that is needed pending the study which title 2 provides for.

We hope that will be the solution. We necessarily oppose the library amendment, and we hope that our proposal will be of assistance to the committee in its determination.

Thank you, Mr. Chairman.

Senator McClellan. It is a very difficult thing involved here. I am trying to understand and sympathize with the viewpoints of all of you with respect to your point that, if you don't have customers, of course, you can't produce.

Mr. Saltzstein. That is our problem.

Senator McClellan. That is your problem, but at the same time, people go to their libraries to get service. If they go to the library and they want to make a copy of a page, if it costs 10 cents or 5 cents or whatever, well, I just don't see how this is going to work. I don't see the economics in it. I don't see how your clients or the authors will really gain anything ultimately.

Mr. Saltzstein. Mr. Chairman, I think one of the problems is, as it's been explained to me, that our publishers hire editorial staffs and they do original research, they ferret out this information, and they disseminate it. Now, if it is going to be at the mercy of a photocopying machine in a library—and granted, there are all kinds of hedges in this—but where does it stop? Maybe we just won't be able to publish any more.

Senator McClellan. We have to try to find some middle ground so the publishers and authors will be protected, that is to say, will be able to get a return adequate to carry on the work before us and also so that the material gets further disseminated, gets further distributed. So you have to make some concessions.

Mr. Saltzstein. I understand.

Senator McClellan. Has to make some concessions to the reader too.

Mr. Saltzstein. Well, I think Williams & Wilkins has made a very, very careful contribution in bringing this action. They are not members of our association, but we certainly commend what they have done in bringing this to the fore. Now, perhaps out of it will come a copyright tribunal payment system.

Senator McClellan. I will commend them, too, if we can find an answer to this.

Mr. Saltzstein. Well, we hope the Commission can find it.

Senator McClellan. Thank you.

[The statement of Robert A. Saltzstein in full follows:]

STATEMENT OF ROBERT A. SALTZSTEIN, GENERAL COUNSEL, AMERICAN BUSINESS PRESS

Mr. Chairman, members of the Committee: The American Business Press is made up of leading American and international technical, professional, trade and financial publications disseminated to special industries. There are approximately 500 member publications in the association, all published by tax-paying companies.

Typical of publications which belong to the association, are Oil and Gas Journal—Tulsa; Pulp and Paper—San Francisco; Progressive Architecture—Stamford; Feedstuffs—Minneapolis; Construction News—Little Rock; Machine Design—Cleveland; Electronic Engineering—Philadelphia; Aviation Week—New York; and Professional Builder—Chicago.

The average circulation of ABP members is approximately 50,000 copies per issue. They have these characteristics in common:

(1) They are circulated to a highly specialized readership which relies on their content for news, research, and other articles of a professional, scientific, and industrial nature concerning the industry or science in which the reader of the publication is engaged.

(2) They require and contain original editorial research, specifically edited for this highly specialized, relatively small circulation universe.

The editorial content ferreted out, researched, and then published in these journals has been protected by the existing copyright law. Fair use, as it has developed in the courts, has enabled a publisher, at the very outset of a new industry, to make an investment in a publication edited for that industry, with the knowledge that for the investment made he would have relative security as to the circulation of that publication, with redress if there was subsequent copyright infringement. The growth of many industries would have been slower had technical and trade journals not been able to maintain their circulations secure against copyright piracy. We welcome the inclusion of Section 107 in the legislation before you.

A publisher frequently carries his publication at a loss for years before a profit is earned. By way of example: In the noise-pollution field, a small publication published in Cleveland, Sound and Vibration, was started in 1966 and turned the financial corner only in 1972. If its material had been subject to publication without effective copyright protection, its continuing contribution to noise-pollution control might well have been choked off, if the publication failed.

Admittedly, there is no effective way to police photocopying within a company. However, one of the largest American corporations had instituted a policy of digesting various business publications, then circulating the digest by way of photocopy machine. This served to cut down the circulation of technical publications distributed in that company. The company soon realized that its employees' need to know, and the need for others in industry to know what that particular company was doing in product development and research activities, would be impaired if the circulation of business publications would be so reduced as to lower the quality of editorial content, or alternatively, to reduce advertising availability. Fortunately, this company rescinded its digest-photocopy arrangement, respects copyrights, and encourages its employees to subscribe to as many specialized business publications as possible.

It is for this reason that the American Business Press urges the Committee to delete Section 108 at this time; we urge that this section be referred for study to the National Commission to be established under Title II of S. 1361.

The Commission will be in a position to expertly analyze the following situations:

(1) When an article is out of print, what is the obligation of a library to determine whether copies are available, and what is the obligation of the publisher to supply that article?

(2) How bona fide is the claim that technical journals are out-of-print and unavailable to libraries from publishers upon request?

In our opinion, the incidence is rare when a publisher denies access to reproduction upon request. Frequently, reprint permission with appropriate public acknowledgment of the original source of the article is given without charge.

A system which permits one copy to be made could be a system which could permit more than one copy to be made in any given time frame and is, in our opinion, impossible of enforcement. Once the copyright protection established in the Constitution is eroded by law, fair use may become impossible to determine, and copyrights could be meaningless.

We respectfully submit that there has been no demonstration of the need for Section 108 or for the American Library Association Amendment. That Amendment would permit partial photocopying rights without investigation of any kind and goes even further than Section 108. We believe that before this fracturing of copyrights is enacted into law, that there should be a much clearer demonstration of need than has heretofore been produced. This must be a fit subject for determination by the Title II Commission.

An additional reason for deleting Section 108 and rejecting the Library amendment pending the study is the inclusion of Section 504(c)(2) which provides:

"In a case where an instructor, librarian, or archivist in a non-profit educational institution, library, or archives, who infringed by reproducing a copyright work in copies or phonorecords, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under Section 107, the Court in its discretion may remit statutory damages in whole or in part."

This provision is protective of libraries and librarians and still preserves fair use. Nothing more is needed pending the study.

While the Commission is making its determination, we can assure the Committee that the tax paying business press of this country, as represented by the American Business Press, will promptly comply with any reasonable request received from any library for any publication, or part thereof, in print or out of print. An appropriate reproduction charge may be assessed; frequently, there is no charge. But reservation of the *right* to charge is necessary to preserve the integrity of what a copyright is all about.

As producers of software so capable of reproduction by photocopy machine, or of mashing into computer systems, we are most seriously concerned with any change in the copyright law, whether it be Section 108, the proposed American Library Association—American Research Library Amendment.

We believe that prior to legislative enactment, the Title II Commission should evaluate the *need* for these provisions. If that is demonstrated to be actual, then the *effect* of a loosening of the copyright laws will have upon the *origination* of necessary scientific and technical information should be considered by that Commission and reported to Congress.

The American Business Press has participated in a series of meetings under different and friendly auspices, all of which have attempted to resolve the dispute which has arisen since the Williams and Wilkins decision. We would like to take this opportunity to commend Williams and Wilkins, not a member of our association incidentally, for the initiative they have taken before the Court of Claims.

We stand ready to work out any reasonable settlement with those who desire the right to photocopy without benefit of copyright, whether it be one copy or many copies. Imposition by statute of a provision granting the right to photocopy, copyright not withstanding, however restricted, can only impede settlement negotiations and could prejudge a situation which may not be as serious as it is made out to be.

We appreciate this opportunity to appear before you. We urge you to defer action on Section 108 and the library amendment pending such time as a reasonable solution can be arrived at without congressional action, or until such time as either the Title II Commission or the parties themselves come to an agreement which congressional action could then indeed solidify.

Thank you.

Mr. BRENNAN. Mr. Chairman, speaking of the Williams and Wilkins Co., we come now to Williams and Wilkins.

Senator MCCLELLAN. Williams and Wilkins come around. Very well.

Mr. BRENNAN. Would you identify yourselves?

STATEMENT OF MRS. ANDREA ALBRECHT, DIRECTOR OF MARKETING RESEARCH, ON BEHALF OF WILLIAMS AND WILKINS CO.; ACCOMPANIED BY ARTHUR GREENBAUM, COUNSEL

Mrs. ALBRECHT. Mrs. Andrea Albrecht, director of marketing research of the Williams & Wilkins Co., accompanied by Mr. Arthur Greenbaum, our counsel, of the firm of Cowan, Liebowitz, and Latman.

Senator MCCLELLAN. Do you want to place your statement in the record or would you like to read it?

Mrs. ALBRECHT. Yes; we would like to place our complete oral statement in the record.

Senator MCCLELLAN. Let it be placed in the record. You may highlight it as you wish.

Mrs. ALBRECHT. And our complete written statement, which we submitted on July 25, we would like that also to be placed in the record.

Senator MCCLELLAN. All right.

Mrs. ALBRECHT. It is our belief that the information contained in scientific periodicals should be disseminated as widely and quickly as possible by any method now known or which is yet to be developed, and of course including photographic methods. All of our statements have stressed that we, in no way, wish to interrupt or halt the dissemination of scientific knowledge through photocopying—but we believe that there must be compensation for this photocopying if the scientific periodical is to remain economically viable and independent of Government subsidy.

It is virtually impossible to increase the number of subscribers beyond those individuals in the discipline served by the periodical or beyond those libraries serving the scientific community.

In 1971 we had 24,217 library subscriptions to our journals; in 1972, 24,502; and as of July 1, 1973, 23,300.

As the figures indicate, there was little library circulation growth in 1972 compared to 1971, and the current 1973 figures indicate our circulation will actually decrease by about 600 subscriptions among libraries.

Senator McCLELLAN. Do you attribute that to the fact they can go to the library and make a copy?

Mrs. ALBRECHT. This is certainly very much one of the factors, sir.

Senator McCLELLAN. Do you think that is a factor?

Mrs. ALBRECHT. Yes. We tried in our own way to prove this as much as we could prove it by doing a random sampling of those libraries which had canceled their subscriptions. We called them on the phone and specifically asked them if a patron were to come in and ask for an article from this journal which had been canceled, how the library would then supply this patron? And the library's response was invariably "through the inter-library loan program." This means one photocopy from one library to another.

Several reasons could be offered to explain the decrease. The number of scientific journals continues to grow while publishers are charging ever-increasing subscription rates. Obviously, if library budgets cannot increase proportionately, some journals must be cut from their lists. Certainly, librarians must be more concerned today about the quality of journals they are purchasing than ever before.

At the same time, however, the number of different libraries purchasing journals is increasing mainly due to the continuing emergency of the Community Hospital Library, but libraries are purchasing smaller numbers of journals, certainly of journals published by Williams and Wilkins. In 1973, we had about 300 more libraries (5,800 total) purchasing our journals than in 1971 but as the figures indicate, fewer journals are being purchased among the total libraries.

Considering the relative quality of W. & W. journals, the above indicates that the interlibrary loan program is working, but not in the best interests of Williams & Wilkins library circulation. If this trend continues, we could experience a 50-percent decrease in library circulation over the next 5 years while the number of libraries served through this well-planned and funded interlibrary loan network will continue to increase.

There may be no valid argument that the above is not in the best interest of the national library economy, but it is evident that, in order to survive, the scientific journals must receive additional income from the libraries engaged in supplying interlibrary loans.

Thus, simply raising the subscription price to those who do subscribe to the journal does not solve the problem. To do this would only result in fewer subscriptions at prices higher than the marketplace can stand and ultimately cause the demise of the periodical itself.

If Congress decides that these limited circulation scientific periodicals (and in 1972 the circulation of our periodicals ranged from a low of 1,200 to a high of 19,000), can be photocopied without reasonable compensation, many of these journals will eventually die. The only way we can see to save these journals from extinction is to broaden their income base by spreading publication costs among those who make use of the information in the journal through means of photocopying.

Libraries pay the Xerox Corp. for the copying equipment, the paper manufacturer for the paper, the utility companies for the electricity to run the equipment, the Post Office for stamps to mail the copies, salaries to the workers who do the copying, and to the librarians who supervise the copying. Many libraries now charge a "transactional" charge for photocopying to cover at least part of these obvious costs. Someone has to pay for these costs and we certainly see nothing wrong with the library's passing these costs on to those who use the information in the form of photocopies. We also think it entirely appropriate that to these many costs there be added a reasonable royalty to the publisher to insure that the publisher can continue to make the obviously useful work available in the future.

It must be continuously remembered that there will be nothing to copy unless the journals remain alive, and that uncompensated photocopying will in the end kill them. By means of blanket license, clearinghouses, or computer accounting, a reasonable royalty for copying can be easily paid to the publisher without the need for complicated bookkeeping, interruption or interference in services. These royalty costs can then easily be passed on to the patron who orders the photocopy. We our selves favor a blanket license plan where the license is incorporated in the subscription price of the journal largely because by this method, no recordkeeping, no accounting, no interruption in service can be experienced by the library.

We believe that those who use the copyrighted information in journals by photocopying should contribute to the cost of publishing and that copyright is the traditional instrument for insuring this contribution while protecting the public interest in wide distribution. If a new theory, i.e., free, indiscriminate and repeated photocopying is legislated, it, in tandem with the new technologies, will destroy the journals and thus create irreparable damage to the public interest.

Finally, our position on the pending copyright revision bill is that we are in favor of bill S. 1361, as submitted, with some amendments for the sake of clarity. We are opposed to any legislative history which appears to construe fair use so as to permit the photocopying of single copies of entire articles without compensation because fair use is a judicial doctrine and its construction is best left to the flexibility of the courts. As for guidance, the ultimate decision in *Williams & Wilkins v. United States*, will aid in pointing the way in this area.

Senator McClellan. Let me ask you a question. Suppose students want a copy of a short article and the student goes into the library and gets the book and just sits down and copies off in his own hand writing. How can you stop that?

Mr. Greenbaum. That is a legal question, Mr. Chairman. May I answer it.

Mr. McClellan. Sure, if you know the answers.

Mr. Greenbaum. Our position is that that would be a technical infringement, but it would be not something that would be picked up. No student is ever going to get sued for that. It is like breaking a stamp on a cigarette package. Maybe it breaks the law, but nobody gets picked up for it. If you break or pull off the tags from the furniture, maybe you break the law, but——

Senator McClellan. Well, he does more than that; he gets the contents. He doesn't just break off the tag and leave the contents when he goes in there and copies that.

Mr. Greenbaum. Yes. Well, we believe that that would be a technical infringement, but that nobody would enforce it.

Senator McClellan. Obviously it would be an infringement if you copied it by photocopying it.

Mr. Greenbaum. Yes. And you asked before what the solution would be, and perhaps the Williams & Wilkins Co., can supply a solution.

After a great deal of effort, they came up with the following plan, which we believe works, and here is the way it goes.

A regular subscriber would pay, let's say, x amount——

Senator McClellan. Would you call it a library subscriber?

Mr. Greenbaum. No, no. An individual, like a doctor. I am talking about scientific medical journals. They now pay x dollars.

Senator McClellan. All right.

Mr. Greenbaum. Now the library which is going to make photocopies for this boy or anybody else who comes into the library, would pay x plus an average of $3.65 at the time that the subscription is obtained or renewed. It would pay x dollars plus $3.65. This would enable that library license to make as many single photocopies as that library wants to make for as many patrons who want to come into that library. Now, that doesn't require any bookkeeping——

Senator McClellan. How do you arrive at the $3.65 figure?

Mr. Greenbaum. That was based——

Senator McClellan. I mean, x may be $2 or it may be $5. How do you arrive at that? One book may sell for $10 a volume, and the other may sell for $1.50. How are you going to arrive at $3.65?

Mrs. Albrecht. The licensing fee which we are talking about here, is our average of $3.65. I think each publisher would determine its own average but certainly keeping within the reasaonable economic status of the library community. We determined a $3.65 average copying fee based on our total manufacturing costs, the number of pages published in a journal, the subscription price of that journal, and what we believe to be this particular journal's susceptibility to photocopying. We publish a broad range of journals, not all of them are certainly equal in content, and not all of them go to the same types of subscribers. Altogether our licensing fee is an average of $3.65 above the individual purchase price.

Senator McClellan. I don't know whether this is actually factual or not, but you might have a book where the original cost may be $3 and then you have this $3.65 cost, which is more than the original cost of the book itself.

Mrs. ALBRECHT. I am not saying that could not happen, but it doesn't happen with our journals. Our average subscription price to a journal—this was certainly in effect before we had institutional rates—averaged somewhere around $30 per subscription.

Senator McCLELLAN. $30?

Mrs. ALBRECHT. Yes.

Senator McCLELLAN. All right. Go ahead.

Mr. GREENBAUM. Mr. Chairman, I might also note if the library chooses not to photocopy, they would get a refund of that $3.65.

Senator McCLELLAN. And how would you know whether they photostat or not?

Mr. GREENBAUM. We would take their words.

Senator McCLELLAN. Just take their word for it?

Mr. GREENBAUM. We sure would. We would be willing to do that.

Senator McCLELLAN. Yes, but if they just report that we don't permit any photostating of this material, you would take their word?

Mr. GREENBAUM. We heard the representative of the Library Association say the librarians are law-abiding people and we would expect they would pay whatever the law required them to pay.

Senator McCLELLAN. Well, I would be glad if you folks could get some understanding and agreement saying, we trust each other, like you are saying now, and then not come in here and ask us to pass a law to regulate this.

Mr. GREENBAUM. Mr. Chairman, I might add that this plan that we have proposed here is not hypothetical. This was actually put into effect and withdrawn.

Mrs. ALBRECHT. We put it into effect as a royalty licensing plan.

Senator McCLELLAN. When did you put it into effect?

Mrs. ALBRECHT. To cover our 1973 subscription rates.

Senator McCLELLAN. 1973?

Mrs. ALBRECHT. Right.

Senator McCLELLAN. It is in effect now?

Mrs. ALBRECHT. This was announced to the subscribers in the middle of 1972 that we were going to do this.

Senator McCLELLAN. And it is in effect now?

Mrs. ALBRECHT. It is not in effect as a licensing plan. It is only in effect as an institutional rate. The institutional rate does not give the library any photographing copying rights at all. It is the same fee. It is the same plan. But our original intention was to allow the libraries to make unlimited number of single photocopies by paying this extra $3.65. The libraries responded with the point which they made, that they felt that the necessity of a copying license did not exist, and they would not subscribe if we were to try and put in this $3.65 as a license to photocopy.

Senator McCLELLAN. So you have abandoned it?

Mrs. ALBRECHT. We abandoned that, but we kept the $3.65 as an institutional rate.

Senator McCLELLAN. You increased their subscription that much?

Mrs. ALBRECHT. To institutions, yes.

Senator McCLELLAN. To institutions? So you got your $3.65 after all?

Mrs. ALBRECHT. Yes, but we didn't give the libraries what we wanted to give them.

Senator McCLELLAN. They would not have any objection now to your giving it to them? I mean, you got their money. Why don't you just say "thank you," and go ahead with your plans?

Mr. GREENBAUM. The reason you can't do that, Mr. Chairman, would be that it would eliminate any kind of control that you would eventually have. The technology is going to change. We all know that 15 years from now we are not going to recognize the technology that we have today and——

Senator McCLELLAN. Well, I am not going to get into that business. I am just puzzled and perplexed and I guess confused like most everybody in trying to resolve this problem.

I think I have a full measure of sympathy for all interests; I mean, I would like to see the publisher and author and so forth compensated, and at the same time, I don't know how you could base it on this 5-percent rate paid by whoever gets a copy, and make this thing work. I don't know how it is going to be practical.

Mr. GREENBAUM. Well, Mr. Chairman, the system we just described works.

Senator McCLELLAN. All right. You've got thousands of books there, and someone comes in and he wants a page out of this book, and another page out of that book, and there are different authors. That's going to be a lot of bookkeeping for a nickel. I just can't figure how this is going to work.

Mr. GREENBAUM. Can I explain that?

I know I am passing the time limits——

Senator McCLELLAN. I know, and I shouldn't have invited you to do so, because at 4 o'clock I have to go to a markup on an appropriations bill. I just have to go, and we have to get through by then. But go ahead. If I don't ask as many questions as you think I should, please understand why.

Mr. GREENBAUM. Mr. Chairman, the blanket license that Williams & Wilkins proposed does not require anybody to pay a nickel a page. It doesn't require them to pay anything per page. You pay it once. It doesn't require any bookkeeping, nothing. It is just the way it is done.

Now there are other publishers who have not yet put this into effect. I guess they would be crazy to put it into effect considering what happened to the Williams & Wilkins Co. when we put it in. We got librarians saying they were going to boycott Williams & Wilkins. I mean, we really got a full measure of hell because of what we did.

Now, if the Williams & Wilkins plan is adopted by other publishers, then it will just be a very simple thing. The library just goes and makes the photocopies and that is it. There is no bookkeeping.

Senator McCLELLAN. All right. Thank you very much.

[The prepared statement on behalf of William & Wilkins follows:]

PHOTOCOPYING AND THE SCIENTIFIC JOURNAL

(A report to the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary United States Senate by The Williams & Wilkins Co., Publishers of Medical and Scientific Books and Periodicals July 25, 1973)

THE WILLIAMS & WILKINS' POSITION

Williams & Wilkins publishes 37 medical and scientific periodicals. It believes that the information contained in its journals should be disseminated as widely and as quickly as possible by any method now known, including photocopying, or which may become known. Williams & Wilkins has never so stated nor has any desire to interrupt or halt the process of dissemination through photocopying—but it must be compensated for photocopying of its copyrighted materials so that the journals can remain economically viable and independent of government subsidy.

The journals involved in *Williams & Wilkins* v. *U.S.*, now pending in the U.S. Court of Claims, are universally recognized as leading journals in their fields, but they have extremely limited circulations, e.g. 1,088 to 17,762, which are a function of the relatively limited market potential for the material. If Congress decides that these journals can be photocopied without reasonable compensation to the publisher many will eventually die because it is virtually impossible to increase the number of subscribers to medical and scientific journals beyond those in the discipline served by the particular journal and those relatively few libraries which have chosen to serve such specialists. However, while the number of subscribers remains static, the costs of publication continually increase. At the same time photocopying technology continues to improve, enabling copies to be made more cheaply and efficiently. If subscription prices are raised to cover costs plus a reasonable profit, the point is soon reached where, instead of subscribing, some users of the material will photocopy. And every time there is a subscription price increase and the photocopying technology improves, there is a greater incentive to photocopy. Thus, raising subscription prices does not solve the problem of providing sufficient income to cover cost because it simply encourages fewer subscriptions and more photocopying. Eventually, there will be so few subscribers and the prices will be so high that the journal will cease publication.

The only way to save private limited circulation technical journals from extinction is to broaden the income base. This can only be done by spreading the costs of publication among a greater number of users, including those who use the journal through photocopying. A photocopying license will enable subscription costs to be kept at a reasonable level and place the economic support of the journal more equitably upon those who value its use.

Libraries pay, among others, the Xerox Corporation for the copying equipment, the paper manufacturer for the paper, the utility companies for the electricity to run the equipment, the Post Office for stamps to mail the copies, salaries to the workers who do the copying, and to the librarians who supervise the copying. Yale University, the New York County Medical Society Library, and many other libraries charge a "transactional" charge for photocopying to cover these obvious costs. Someone has to pay for these costs and we see nothing wrong with those libraries which pass these costs on to those who request the photocopies. We also think it entirely appropriate that to these many costs there be added a fair and reasonable royalty to the publisher to ensure that the publisher can continue to make the obviously useful work available in the future.

By means of blanket licenses, clearing houses, or computer accounting a reasonable royalty for copying can be easily paid to the publisher without the need for complicated bookkeeping, interruption or interference in service. These costs can then easily be passed on to the patron who orders the photocopy. We ourselves favor a blanket license plan where the license is incorporated in the subscription price of the journal because it requires no record keeping or accounting on the part of the library.

The doctor in North Dakota or Hawaii who has to obtain a copy of a journal article from Yale University will have to pay a minimum charge of $3.50 plus, perhaps, an additional service charge to his local library. Certainly a slight extra charge by Yale to cover the copyright royalty would not be unfair or interfere with the service. The alternative would be to have no copyright royalties paid by anyone and, thus, eventually destroy the journal when photocopying becomes more and more available through microfiche, computers, lasers, or who know what.

The costs of publication should be equitably divided among those who use the journals by buying printed copies and those who use it by photocopying. If only subscribers to printed copies need pay for their information libraries will cut costs by cancelling subscriptions and servicing their patrons by means of photocopies obtained from other libraries. The library, by charging the patron for the cost of the photocopies, will have serviced the patron, saved the cost of the subscription, and perhaps even received a contribution to its overhead from its charge to the patron. Williams & Wilkins has, of course, no objection to this means of information dissemination—but if it cannot receive a royalty for the copying it will have to raise its prices to those libraries who continue to subscribe and to its individual subscribers. As prices get higher, there will be more incentive to photocopy until the journal is so expensive that it is discontinued.

Furthermore, to put the burden of increased costs on the individual subscriber is, in addition to being self-defeating, simply not equitable. The number of subscribers is decreased because of photocopying. Those who do *not* generally photocopy, i.e. the individual subscribers, should not be required to bear the substantial increased costs per unit created by the decreased circulation which has been caused by the photocopies.

Williams & Wilkins believes that those who use the copyrighted information in its journals by photocopying should contribute to the cost of publication and that copyright is the traditional instrument for insuring this contribution while protecting the public interest in wide distribution. If a new theory, i.e. free indiscriminate and repeated photocopying, is legislated it, in tandem with the new technologies, will destroy the journals and thus create irreparable damage to the public interest.

CHRONOLOGY OF THE DEVELOPMENT OF THE LICENSING/INSTITUTIONAL RATE PLAN

Discussions of a plan to allow libraries to furnish their customers with photocopies of copyrighted articles were begun before the February 16, 1972 decision from Commissioner Davis of the Court of Claims. Above all, the plan was *not* to be a cumbersome administrative or economic burden upon libraries. It was to include a simple system of payment to broaden the income base required to support the journals. This will help offset the loss of income where photocopies will replace the purchase of multiple subscriptions, library and personal subscriptions. Basic ideas about a proposed plan were discussed with several libraries.

When the Davis decision was received, we had a "digest" of the opinion prepared and mailed to more than 8,000 friends and customers of the house, among them some 5,800 libraries. A covering letter (Ex. 1) attempted to allay any concerns that Williams & Wilkins had intentions of curtailing photocopying or of a high-priced and complicated royalty payment system.

Even before a Williams & Wilkins licensing plan was announced, a memorandum (Ex. 2) from L. L. Langley, Ph. D., Associate Director for Extramural Programs at the National Library of Medicine was sent to NLM's Resource Grants grantees stating. "The express purpose of this memorandum is to inform you that grant funds from the National Library of Medicine must not be used for royalty payments to publishers without prior approval from the National Library of Medicine." (This memo did not come to the attention of Williams & Wilkins until sometime after our plan was formally announced in June 1972.)

Full-page ads (Ex. 3), again stressing that we were developing a simple, workable licensing plan, were purchased for the following journals: "Bulletin of the Medical Library Association" April 1972 issue; "College and Research Libraries" April 1972 issue; "Library Journal" April 15, 1972 issue; and "American Libraries" May 1972 issue.

In June 1972, a letter was sent to our institutional customers formally announcing and describing our licensing plan (Ex. 4) as follows:

1. Beginning 1973, W&W journals would carry an institutional rate, ranging $1–$10 higher than the individual subscription rate.
2. The institutional rate would carry with it an automatic license to make single copy photocopies for patrons in the regular course of library operations.
3. This institutional rate would cover the making of single copy photocopies for the life of the volume and would permit photocopies to be made from all previously published volumes at no additional charge. No additional payments or record keeping would be involved.
4. Multiple copies could be made upon remittance of 5¢ per page per copy, but permission was not granted for copies made for interlibrary loan use.
5. Institutions would be entitled to a refund of the license portion of the subscription rate if no copying of the journal took place.

On June 23, 1972 a personal letter was sent to each Director of the 11 Regional Medical Libraries (Ex. 5) discussing the institutional rate and announcing our intention to license these libraries, which were set up for the purpose of providing interlibrary loan copies, at the rate of 5¢ per page per copy.

BACKGROUND OF THE WILLIAMS & WILKINS LICENSING PLAN

W&W journals would carry an institutional rate, the difference between the individual subscription rate and the institutional rate would constitute the license fee. The fee would be based on the number of text pages published in the journal in 1972, the susceptibility of the journal to be photocopied (based on our experience with reprint requests) multiplied by a ratio no higher than 5¢ per page. (Five cents per page is our average price per page for all printed copies of all our journal.) As a result of using this formula and our desire not to place too great an economic burden upon the library whose practice is not to pass costs on to patrons, the average increase in subscription prices to institutions was $3.65. In all cases the photocopy fees averaged less than one cent per text page published in 1972, however the actual license was to be effective for photocopying materials from Volume 1 through the 1973 volume of the journals. This amounts to thousands of pages for each journal, thus making the average photocopying price per page extraordinarily minimal.

The license fee would apply to single copy photocopying only, as librarians seemed to concede that they do not permit multiple copies. However, to facilitate dissemination where multiple copies were needed, the library was permitted to do so upon remittance of 5¢ per page per copy.

The resulting institutional license fee was too minimal to cover income losses in cases of the interlibrary loan system, which absolutely replaces library subscriptions. To charge a flat rate for every library, great and small, sender or receiver of interlibrary loan copies, would be inequitable. Since the interlibrary loan system already provided for the administration of enumerating individual articles, it seemed reasonable that these "lending or sending" libraries could more equitably be licensed on a pay as you go basis.

On July 31, 1972, Dr. Martin Cummings, Director of the NLM replied to our licensing plan (Ex. 6) with the following: "It is our position that we would accede to a rise in price based on an institutional rate which would be applied 'to all libraries, great and small', but could not accept the implication that a license for photocopying is necessary. We would be pleased to renew our subscriptions at the individual rate, or at an institutional rate which does not include a license for photocopying. If you insist upon tying the renewal of our subscriptions to payment of a license fee, however, we shall have no option other than to let them lapse."

This statement from Dr. Cummings, his similar statement of July 31, 1972 (Ex. 7), along with published statements by the American Library Association, The Special Libraries Association, and the Medical Libraries Association (Ex. 8) in response to our licensing plan, brought forth a deluge of letters from librarians threatening a boycott of W&W journals on the basis that a license for photocopy was not necessary.

WE WITHDRAW OUR LICENSING PLAN

Because such a boycott would affect both The Williams & Wilkins Co. as well as the professional societies of which we publish not only in subscription income but also in the indication by the National Library of Medicine that it would exclude our journals from listing in Index Medicus (Ex. 9), we had no alternative but to accept the position advocated by the NLM.

On October 2, 1972 we again sent letters (Ex. 10) to all of our customers and friends describing our new position as follows: "In order to allow the NLM and all libraries to subscribe to W&W journals at increased rates and include them in Index Medicus, we now accept the NIH–NLM position. Our new institutional rates which we shall continue to request shall have no connection whatever with a license to photocopy, implied or otherwise. In short, libraries may continue to supply their users with royalty free single-copy reproductions of W&W journal articles as they have done in the past. As stated many times, we have no desire to obstruct the dissemination of scientific information between library and scholar, which would certainly be the result of cancellation of subscriptions. Further, in the same spirit we are, again without prejudice, withdrawing our proposal for the five-cents-per-page interlibrary loan fee until the appeal of our case is heard."

A letter of similar content (Ex. 11) was again mailed to all libraries on January 11, 1973.

We stand ready and willing to reinstate the license to photocopy as a part of the institutional subscription price as and when Commissioner Davis' opinion is confirmed in the appeal of our case before the Court of Claims. Furthermore, we have developed a similar type plan to deal with the problems connected with the Interlibrary Loan procedures. The salient points of this plan are described in our letter of April 30, 1973 to Dr. Martin Cummings (Ex. 12). This implementation of the Interlibrary Loan plan also awaits the outcome of our lawsuit in the Court of Claims.

STATISTICAL PROOF OF MARKET LOSS

Although common sense would tell one that the making of photocopies of millions of pages of articles appearing in scientific periodicals would have an adverse effect on the sale of subscriptions, it has been difficult in the past to statistically prove this contention. However, library subscriptions to Williams & Wilkins journals for the past three years now show beyond a reasonable doubt that the Interlibrary Loan procedure is damaging our market.

In 1971 we had 24,217 library subscriptions to our journals; in 1972, 24,502; and as of July 1, 1973, 23,363.

As the figures indicate, there was little library circulation growth in '72 compared to '71, and the current '73 figures indicate our circulation will actually decrease by about 600 subscriptions among libraries.

Several reasons could be offered to explain the decrease. The number of scientific journals continues to grow, while publishers are charging ever-increasing subscription rates. Obviously, if library budgets cannot increase proportionately, some journals must be cut from their lists. Certainly, librarians must be more concerned today about the quality of journals they are purchasing than ever before.

At the same time, however, the number of different libraries purchasing journals is increasing mainly due to the continuing emergence of the Community Hospital Library, but libraries are purchasing smaller numbers of journals, certainly of Journals published by Williams & Wilkins. In 1973 we had about [illegible]90 more libraries (5,800 total) purchasing our journals than in 1971 but as the figures indicate, fewer journals are being purchased among the total libraries.

Considering the relative quality of W&W journals, the above indicates that the Interlibrary Loan Program is working,[3] but not in the best interests of Williams & Wilkins library circulation. We recently surveyed a random sampling of librarians who had cancelled their subscriptions and asked how they intended to service patrons who might want to use the cancelled journal. Invariably, the replay was, "by means of interlibrary loan," which means one library supplying another with a photocopy. If this trend continues, we could experience a 50% decrease in library circulation over the next five years while the number of different libraries served through this well-planned and funded Interlibrary loan network will continue to increase.

There may be no valid argument that the above is not in the best interests of the national library economy, but it is evident that in order to survive, the scientific journals must receive additional income from the libraries engaged in supplying Interlibrary loans.

Other figures which we might sight fail to show the same precise cause and effect relationship as is shown by reduction in library subscriptions. For example, we believe that persons who live in the United States and who do not receive a journal as a part of their membership in a sceintific society are the ones most likely to photocopy rather than become or to remain subscribers to the journal. This belief is borne out by the fact that this class of subscribers has actually decreased in 1973 as compared to 1972 with 11 of the journals which we publish and this despite the fact that we have greatly increased our promotional efforts. However, on the other hand, 15 of our journals have responded to our intensified promotion and in these instances the number of domestic non member subscribers has increased.

The following clipping from the July 20, 1973 issue of *Science* points out the economic pressure to photocopy rather than to subscribe.

THE PRICE OF BOOKS

The price of scholarly books has increased drastically in recent years. The books reviewed in *Science* as of 1 June cost 5.0, 5.3, 6.3, 7.2, 7.7, 8.8, 8.9, and an incredible 11.0 cents per page. As the cost of copying has dropped in recent years, one can copy a book at 5 cents a page in most libraries on public copiers and, by copying two pages at a time, reduce the cost to 2.5 cents per page. Of course, this is an infringement of the copyright but, at today's prices, a practice that will become increasingly common. Book publishers appear to be urgently in need of technological advances that will cut the cost of production.

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[3] For a description of Interlibrary Loans for Hospital Libraries see Chap. 15 of Library Practice in Hospitals—A Basic Guide, edited by Harold Bloomquist, et al, The Press of Western Reserve University, 1972.

DAVID LESTER,
Psychology Program, Stockton State College, Pomona, N.J., Science, Vol. 181.

We fear that no technological advances can cut the cost of production sufficiently to make up for the fact that the photocopy at present bears no part of the editorial and composition costs which are incurred before a single copy can be reproduced.

New Technological Uses of Copyrighted Works[2][3]

Until the last decade, the vast majority of library resources were in printed form. Library procedures were accomplished using paper products, with an occasional assist from the telephone. The recent proliferation of new media for packages of information has been surpassed only by the rapid birth and growth of technologists concerned with transmission, description, identification and retrieval of these information packages.

Libraries are involved in every phase of information processing from identification and ordering through retrieval and dissemination.

Examples of some current and future library-usable technologies:

1. Facsimile Transmission

Facsimile transmission devices can rapidly transmit exact copies of information over long distance network transmission points. While the systems currently on the market are costly and not quite compatible to one another, it is reasonable to believe that problems will be overcome in the future and could provide a working system for the rapid transmission of materials from one library to another.

2. Satellites

NASA and HEW are jointly exploring the use of experimental satellites for the exchange of information; one of the tests will involve the exchange of interlibrary loan materials.

3. Video Telephones

Video telephones which display pictures from one telephone to another are presently in operation. Certainly future technological improvements will bring about decreased operational costs and hard copy reproductions of video displays.

We believe that these few examples of new technologies in information dissemination should be the subject matter of study for the National Commission on New Technological Uses of Copyrighted Works proposed in Title II of S. 1361.

We are in favor of Bill S. 1361 as submitted, with some amendments for the sake of clarity. We are opposed to any legislative history which appears to construe fair use so as to permit the photocopying of single copies of entire articles without compensation because fair use is a judicial doctrine and its construction is best left to the flexibility of the Courts. As for guidance, the ultimate decision in *Williams & Wilkins* v. *U.S.* will aid in pointing the way in this area.

THE WILLIAMS & WILKINS CO.,
Baltimore, Md.

EXHIBIT 1

TO OUR FRIENDS AND CUSTOMERS: On February 16, 1972 a Commissioner of the United States Court of Claims issued an opinion sustaining our claim for copyright infringement resulting from the unauthorized reproduction of our copyrighted materials on photocopying machines in certain Government libraries. The Commissioner held that we are entitled to "reasonable and entire compensation." We have prepared a digest of the Commissioner's opinion, a copy of which is enclosed with this letter. We believe that you who are deeply concerned with the health of scientific journals will read this with interest.

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[2] See "Advanced Technologies/Libraries" published by Knowledge Industries, Inc. 1971–72.

[3] Also see Chap. 16 Health Sciences Information Retrieval Systems Library Practice in Hospital—A Basic Guide Edited by Harold Bloomquist, et al. The Press of Case Western Reserve University, 1972.

Although the Government does have a right to carry the proceedings further, it is, of course, our hope that this will mark the end to four years of litigation to establish the right of medical journals to remain viable so that they might continue to serve the scientific community.

Commissioner Davis' statement, "the plaintiff does not seek to enjoin any photocopying of its journals" should once and forever allay the fears of libraries and their patrons that our suit was aimed at the curtailment of photocopying (see p. 6 of the Report of the Commissioner).

Another concern of the libraries has been that a complicated and costly system of record keeping would be required to handle the payment of royalties to copyright owners. Nothing could be further from the truth. We have developed a simple and workable plan whereby libraries would be permitted to make single photocopies upon payment of a reasonable annual license fee. No record keeping or accounting would be involved. At the same time the plan recognizes that the cost of publication should be spread in a fair manner among the users of medical and scientific publications, including photocopiers, to avoid even higher subscription costs.

We hope that Government libraries as well as other public and private institutions will work with us toward a solution which gives proper balance to the public right to the flow of scientific information and the need of the author or publisher to compensation for having made the information available.

We welcome comments or questions from our many friends in the scientific world in reference to this matter which is of such vital importance to us all.

Most sincerely,

WILLIAM M. PASSANO,
Chairman of the Board.

EXHIBIT 2

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
NATIONAL INSTITUTES OF HEALTH,
March 7, 1972.

To: Resource grants grantees.
From: Associate director for extramural programs, NLM.
Subject: Payment of royalties to publishers.

1. On February 16, 1972, a Commissioner of the United States Court of Claims recommended to that Court that the plaintiff in the case of the Williams & Wilkins Company v. the United States is entitled to recover reasonable compensation for infringement of copyright. The Williams & Wilkins Company publishes 37 medical journals and has sued the United States Government alleging that the National Library of Medicine has infringed the copyright that Williams & Wilkins holds on four of those journals, namely *Medicine, Journal of Immunology, Gastroenterology* and *Pharmacological Reviews*. The alleged copyright infringement is said to have resulted from the practice of the National Library of Medicine in supplying photocopies of articles from those journals.

2. The recommendation of the Commissioner will now be considered by the full Court of Claims and in all probability will ultimately be carried to the United States Supreme Court. Accordingly, a final decision will not be forthcoming for some time.

3. The Williams & Wilkins Company, following the recommendation of the Commissioner of the United States Court of Claims has approached several libraries requesting royalty payments from the libraries for the right to photocopy articles from the journals. Conceivably, other publishers may do the same.

4. The expressed purpose of this memorandum is to inform you that grant funds from the National Library of Medicine must not be used for royalty payments to publishers without prior approval from the National Library of Medicine. This matter is now under intensive study at various levels and will be considered by the National Library of Medicine's Board of Regents on March 28, 1972. You will be kept informed concerning this matter but until further notice, you are not authorized to utilize grant funds for payment of royalties to any publishers.

L. L. LANGLEY, Ph. D.,
Associate Director for Extramural Programs.

EXHIBIT 3

The Williams & Wilkins Company v. The United States

A STATEMENT OF FACT AND FAITH

We, as a leading publisher of medical books and journals, are dedicated to the concept of the proper dissemination of medical knowledge.

In 1968 we filed suit against the United States Government for infringement of certain copyrights in medical journals resulting from the unauthorized reproduction of our copyrighted materials by photocopying equipment. In the Report of the Commissioner to the Court of Claims (February 16th, 1972), the following facts are reported:

(1) Article 1 of the copyright statute says that the copyright owner ". . . shall have the exclusive right: (a) to print, reprint, publish, copy and vend the copyrighted work . . ."

(2) Each article in a journal is protected from infringement to the same extent as the entire journal issue.

(3) The Williams & Wilkins Company is entitled to recover reasonable and entire compensation for infringement of copyright.

These are the facts of the court case, but the implications may well be causing grave concern to librarians and the users of libraries. Let us make our position clear. We are by no means going to halt the proper dissemination of medical knowledge; our ideals now are the same as formerly—to serve the medical and science communities to the best of our abilities.

There will be no halt to the photocopying of material, as such a halt would indeed be harmful to the dissemination of knowledge. Neither will there be an unmanageable, unwieldy and costly system of record-keeping of photocopied materials as such a system would be detrimental to the library profession.

Instead, we have worked out a simple plan based on the idea of a reasonable annual license fee for the right of copying our materials. In this way, the librarian will be licensed to photocopy copyrighted materials without infringing copyright law, and the publisher will be recompensed for the use of his materials.

We are hopeful that this statement will allay any fears which librarians or library users may be harboring. We welcome your comments and questions, and conclude by assuring you of our good faith and commitment to the medical communities and the library profession.

THE WILLIAMS & WILKINS CO.,
Baltimore, Md.

EXHIBIT 4

A STATEMENT TO LIBRARIANS FROM THE WILLIAMS & WILKINS CO.

The Wiliams & Wilkins Company has always charged the same subscription price to libraries that it charges to individuals despite the fact that for many years it has been customary for publishers to charge institutional subscribers to journals a higher subscription rate than that paid by individual subscribers. The concept of special institutional rates evolved from the idea that the copy of a journal owned by a library or other institution serves many more readers than does the copy owned by an individual. In light of this, the higher rate is charged to spread fairly the ever-increasing costs of publication among *all* those who *use* the journal and to components for possible loss of individual subscription revenue. If uncompensated, this loss is suffered not only by the publisher, but by those professional societies dependent on income from their journals.

Another aspect of multiple use is the photocopying of material contained in a journal and its subsequent distribution to library users. By allowing the use of photocopying equipment, librarians effect increased use and readership of the journal. The journal paid for by one institutional subscription is thus, through photocopying and multiple exposure, used far more than the journal paid for by an individual.

We have always felt that photocopying without the consent of the copyright owner was against the law. This view has not been confirmed in the first case ever brought on the issue, a suit filed against the United States Government by The Williams & Wilkins Company.

The suit was commenced in 1968 as a test case and has led to a 32 page opinion handed down by Court of Claims Commissioner James F. Davis on February 16, 1972. The opinion held that we are entitled to "reasonable and entire compensation" for library photocopying of our journal articles.

Beginning with 1973 volumes, we have institutional subscription rates which provide for an automatic license to make single-copy photocopies of articles from our journals for your patrons in the regular course of library operations on your premises, but does not include the making of photocopies for other institutions or for fulfilling interlibrary loans. There is no time limit on the exercise of this right and single-copy protocopies may be made throughout the life of the journal volume. The institutional rates are minimal increases of $1 to $10 per journal. No additional payments or any record-keeping procedures will be required. These rights are simply and automatically secured by payment of this institutional rate. Single-copy photocopies may also be made from volumes published prior to 1973 at no charge. Multiple copies of a single article may be made upon remittance of 5¢ per page per copy made to the publisher.

A journal exists to provide wide-spread and quick dissemination of information; its value is to those who subscribe to it or use its information. Subscriptions are the very life blood of a journal, but when *users* do not contribute in any way to its sustenance, the very existence of the journal is jeopardized. In our view, it would not be unreasonable for libraries to pass on to their patrons who request photocopies, a few cents to recover the increase in subscription rates, just as many do to cover charges made by equipment manufacturers.

Beginning with the January issue of each of our journals, there will be an Instruction for Photocopying which advises individuals to patronize their libraries in obtaining photocopies.

As has been documented many times, Williams & Wilkins has no desire to curtail photocopying. We prefer to permit libraries to continue their practices while at the same time insuring that the costs of publishing journals be spread equitably among all users.

The proper dissemination of scientific knowledge is an ideal to which we, as publishers, have always been dedicated. We continue in our dedication to that ideal, and are confident that our solution is fair, reasonable and workable.

You will automatically be billed for the new subscription rate for 1973 volumes via your usual method of ordering (either through your agent or direct from us). In the unlikely event that no photocopies will be made of any articles in one or more of our journals to which you subscribe and you are in a position to assure us of this fact, you may apply for a refund for that portion of the institution rate which covers the license to photocopy. Be sure to make such application directly to The Williams & Wilkins Company and *not* through your agent and then only *after* you have entered your institutional subscription. You should recognize, however, that a license such as that in the institutional subscription rate is a legal requirement in order for you to make photocopies.

We are most willing to communicate directly with our customers. Any inquiries may be directed to Mrs. Andrea Albrecht, 301—727–2870 (collect).

EXHIBIT 5

JUNE 23, 1972.

DR. MARTIN CUMMINGS,
Director, National Library of Medicine, Mid-Atlantic Regional Medical Library,
Bethesda, Md.

DEAR DR. CUMMINGS: The Williams & Wilkins Company publishes 38 scientific journals containing approximately 2,600 articles, 80% of which will appear in journals we publish for societies as their official publications. Net earnings from these journals are shared with the societies. The societies' share is generally 50% (sometimes greater) and it is usually used by them to defray the cost of editing.

In the main our journals are supported by their users. 64% of the journal's income comes from subscribers, 24% from advertiser support, 8½% from the sale of reprints and 3½% from the sale of back issues. Since reprography is another form of use, we continue to reiterate "use all you like, but pay for what you use." Thus, as reprography inevitably grows (and we think it should), this form of use should pay its fair share to help keep the learned periodical afloat. Certainly, without them many publishers and librarians alike would have lesser reasons for being.

So, beginning with the 1973 volumes, each of our journals will be offered to our library subscribers at institutional rates which will average $3.65 per volume higher than the rates to individuals. *Such an amount is well below the institutional rates offered by many other publishers with no attending benefits and certainly well below some erroneous forecasts.* This modest increase carries with it an automatic license which allows the library to make single-copy photocopies of articles from our journals for their individual patrons in the regular course of library operation on the premises. The institutional rate applies to all libraries, great and small, but it does not include the making of photocopies for other institutions, commercial or noncommercial organizations, or fulfilling interlibrary loans. In the interest of maintaining the principle that scientific journals will be supported by those who use them, it would seem reasonable for libraries to increase their photocopying charge to their patrons by a few pennies which in the course of a year will more than repay the added cost of the institutional rate.

Beginning October 1, 1972, we will license each of the 11 regional libraries engaged in the interlibrary loan program at a rate of 5¢ per page per copy for each photocopy of articles appearing in our journals supplied to other libraries. In connection with this license, we should like to make the following comments:

1. Although we believe that the receipts from interlibrary loan payments will be less than 1% of the journals' total income we nevertheless look upon them as essential to the long-time health of the journals. We can visualize the ultimate case when only the regional libraries will subscribe to some of our journals and if that time should come, the income from library loan photocopies will be vital to the journals' support.

2. As closely as we can estimate we do not expect to receive more than $500 per year per regional library on the average. Even the N.L.M. will probably find the cost in the neighborhood of $1,000 annually which is the cost of 20 average journal subscriptions.

3. We understand that records are currently kept of all interlibrary loan transactions and therefore only a slight additional effort will be required to account for payments to the copyright owner. We propose such payments being made semi-annually.

4. We think it reasonable for regional libraries to add 5¢ per page to the charge which we understand most now make for supplying photocopies on interlibrary loans. Not only will this recover to the library the payments made to us but also will allow the real users of the journals to share in their support.

5. The opinion of Commissioner Davis of the Court of Claims in our suit against the Government is an authoritative judicial interpretation of the Copyright Act as it applies to library photocopying and will remain so unless or until it may be altered on appeal.

This letter is being sent to each of the regional libraries well in advance of our normal billing time so that everyone will have time to digest and discuss our plan. We, of course, welcome the opportunity to discuss any aspect of this plan with you. We hope that by the reasonable nature of our position you will accept our continued affirmation that we are not adversaries but rather concerned public who look upon you as valued customers and colleagues.

Sincerely,

William M. Passano,
Chairman of the Board.

EXHIBIT 6

Department of Health, Education, and Welfare,
Public Health Service,
National Institutes of Health,
Bethesda, Md., July 31, 1972.

Mr. William M. Passano,
Chairman of the Board,
The Williams & Wilkins Co.,
Baltimore, Md.

Dear Mr. Passano: I am writing in response to your letter of June 23, in which you detail the imminent imposition of institutional subscription rates beginning with 1973 volumes, which rates will include payment of licensing fees for photocopying for interlibrary loan purposes, beginning October 1, 1972.

In connection with the institutional subscription rate, your letter indicates that the new rate carries with it an automatic license for making single-copy photocopies for individual patrons in the regular course of operations on the premises. Your recent "Statement to Librarians" states that a *portion* of the institution rate covers this license. However, you have subsequently indicated to us that the *entire* price difference between the institutional rate and the individual rate constitutes payment for this license. It is our position that we would accede to a rise in price based on an institutional rate which would be applied "to all libraries, great and small," but could not accept the implication that a license for photocopying is necessary. We must, therefore, respectfully decline to pay the institutional rate for our subscriptions, at least during the pendency of the litigation between us. We would be pleased to renew our subscriptions at the individual rate, or at an institutional rate which does not include a license for photocopying. If you insist upon tying the renewal of our subscription to the payment of a licensing fee, however, we shall have no option other than to let them lapse.

You also state you plan to charge a fee of 5 cents per page for each photocopy made for purposes of interlibrary loans. On the advice of our counsel, I am instructing my staff, as well as the Regional Medical Libraries, to refuse payment of such a fee based on our position in the case before the Court of Claims. Further, we believe it inappropriate to make any change in acquisition and interlibrary lending practices until that litigation is finally adjudicated.

With respect to the Regional Medical Libraries, our instructions apply, of course, only to those items paid for with contract or grant funds from the National Library of Medicine. Although we have informed them of the action we are taking with regard to the institutional subscription rates, we would not presume to advise them regarding the position to be taken by their parent institution for services they furnish on their own behalf.

Sincerely yours,

MARTIN M. CUMMINGS, M.D.,
Director.

EXHIBIT 7

JULY 31, 1972.

To Regional Medical Library Directors:

As you are aware, on February 16, 1972, Commissioner James F. Davis of the U.S. Court of Claims filed a "Report of Commissioner to the Court" on the copyright infringement suit against the Federal Government by the William & Wilkins Company. This preliminary report holds that the longstanding photocopying practices of NLM and the NIH Library are in violation of the journal publisher's copyright. The Commissioner's Report is not final and the Justice Department has filed an exception to the Report with the Court of Claims.

Despite the fact that the case is still being adjudicated, the Williams and Wilkins Company has informed the National Library of Medicine that beginning October 1, 1972, they plan to license each of the eleven regional medical libraries engaged in interlibrary loans for photocopying articles from their journals at a rate of 5 cents per page per copy. A number of libraries have asked us for clarification of the NLM position on these matters.

Until such time that you are informed otherwise, it remains our policy that no NLM contract or grant funds may be spent for licensure or royalties for photocopying journal articles for interlibrary loan purposes because we believe such payments to be unnecessary. If it should be ultimately decided that such photocopying must be licensed, such costs will then be considered as proper charges against grant and contract funds.

We cannot advise you in your dealings with Williams and Wilkins Company concerning services you provide outside the guidelines of the registered medical library programs. However, it may be of interest to you to know our position concerning Williams and Wilkins Company's new 1973 institutional subscription rates which purportedly provide for an automatic license to make single photocopies of journal articles on the premises. We plan to inform the Company that we will not pay their new institutional subscription price, but will pay whatever subscription rate they may set for institutions that excludes the license fee.

We hope this will assist you in planning for the activities of the NLM component of your library.

MARTIN M. CUMMINGS, M.D.,
Director.

EXHIBIT 8 (A)

The American Library Association (ALA) WASHINGTON NEWSLETTER of August 11, 1972 contained the statement that follows.

Williams & Wilkins has recently published "A Statement to Librarians" which announced the establishment of a "Special Institutional Rate" applicable to library subscribers. Such rate is significantly higher than the regular subscription rate, involving an average increase of approximately 12½ percent.

The Statement further advises that libraries may not make photocopies of Williams & Wilkins' works for purposes of interlibrary loan, even if purchased at the Special Institutional Rate. Moreover, it demands that libraries pay a royalty to William & Wilkins of 5¢ per page per copy on multiple copies of a single work.

Innumerable libraries, librarians, and library trustees throughout the country have requested advice from ALA as to the response they should make to the demands of Williams & Wilkins.

The American Library Association is not in a position to prescribe the response of libraries and librarians, since that response will necessarily vary on the basis of a variety of local considerations.

However, it should be noted that:

First, a number of leading libraries have individually determined that they will not renew their subscriptions at the Special Institutional Rate;

Second, William & Wilkins' assertion that "a license such as that in the institutional subscription rate is a legal requirement" is based on a Commissioner's Report and is not, to date, the decision of the Court of Claims;

Third, the propriety of the Commissioner's Report is being strenuously contested in the Court of Claims by the Federal Government, the American Library Association, the Association of Research Libraries, the Medical Library Association, and a number of other educational groups and institutions;

Fourth, libraries in which copies are made on coin-operated photocopiers not under library supervision and control, derive substantially no protection which they do not already enjoy under the license granted by the Institutional Subscription Rate;

Fifth, general acceptance of the "use tax" concept of the Williams & Wilkins Institutional Subscription Rate may reasonably be expected to encourage other journal publishers to levy their own "use taxes" at ever-increasing rates:

Sixth, the Institutional Subscription Rate does not authorize copies for interlibrary loans and thus contemplates a continuing and rigorous restriction on access to scholarly materials contained in Williams & Wilkins' publications.

Each library must decide for itself whether it will pay a premium for Williams & Wilkins' works notwithstanding the significant limits imposed on their use, and on the access to them, by the Institutional Subscription Rate.

EXHIBIT 8 (B)

Special Libraries Association (SLA) has issued the following statement to its members which was proposed by the SLA Special Committee for Copyright Law Revision and approved by the SLA Board of Directors.

Through its Special Committee on Copyright Law Revision, the Special Libraries Association has been engaged in the ten-year legislative revision effort that is now before Congress. To special libraries the rights to photocopy research materials under a "fair use" principle has been central to the SLA concern with the revision of the copyright law. Based on a recommendation from its Special Committee, the SLA Board of Directors in 1964 reaffirmed the principle of "fair use" as follows:

"A library owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of a loan of such publication or in place of manual transcription and solely for the purposes of research."

In view of the recent *Williams & Wilkins* report, it is now deemed desirable that the Association take a position on the photocopying issue for the guidance of the Association's members. Whether adopted or rejected by the U.S. Court of Claims, the *Williams & Wilkins* report implies that libraries will be responsible for reimbursing publishers through a subscription surcharge, a per page licensing fee or a similar royalty arrangement. Increased costs to all special libraries will plainly result. Depending on the basis of reimbursement, any of these schemes will encumber the administration of special libraries and will burden their staff everywhere with unnecessary tasks, thus detracting from important functions. Moreover, an inevitable consequence of the opinion, should it stand, would be the inhibition of the business, education and scientific research communities who are the principal users of special libraries.

Pending final judicial action, the Association advises its members to continue copying practices followed heretofore. In the event that individual libraries are approached by publishers desiring to negotiate licensing agreements, royalty payments or subscription surcharge agreements, such requests should be referred to the legal counsel of their company or library, with advice to SLA's New York office of such actions.

EXHIBIT 8 (C)

The following statement was included in the August 1972 issue of MLA NEWS, a publication of the Medical Library Association.

However firmly Williams & Wilkins may be convinced that the Davis report on the copyright suit against NLM and NIH is law, just as firmly the Medical Library Association is convinced that the case is *sub judice*. Williams & Wilkins has demonstrated its conviction by announcing, for the journals that it publishes, special institutional subscription rates, higher than those charged individual subscribers, "which provides for an automatic license to make single-copy photocopies of articles" for library patrons (but not for inter-library loan). *The right of Williams & Wilkins to seek such additional payments is the subject of review by MLA's legal counsel.*

Obviously the Medical Library Association believes that the Williams & Wilkins subscription/photocopy "package" is not in the public interest. Libraries, however, must decide individually whether or not they want to accept this type of proposal. They must weigh the fulfillment of immediate needs against the possibility of weakening the case for legislative provision of single-copy photocopy for medical research and physicians' study. They might also confer with their own institutional counsel.

We are aware that librarians are very conscious of their responsibility for the library's collection. As a means of maintaining the integrity of the collection, they might seek contributions of Williams & Wilkins periodicals to the library by individual subscribers.

Whatever action is decided upon, we suggest that individual institutions and libraries make their opinions known to Williams & Wilkins, to the National Library of Medicine, to the Department of Justice, Civil Division, attention of Thomas J. Byrnes, and to the Medical Library Association.

EXHIBIT 9

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
NATIONAL INSTITUTES OF HEALTH,
Bethesda, Md., September 12, 1972.

EUGENE B. BRODY, M.D.,
Editor, Journal of Nervous and Mental Disease, Institute of Psychiatry and Human Behavior, University of Maryland School of Medicine, Baltimore, Md.

DEAR DR. BRODY: We are addressing this letter to you in your capacity as Editor of the *Journal of Nervous and Mental Disease*. As you probably are aware, your publisher, the Williams and Wilkins Company, has been involved in a copyright infringement suit against the Federal Government. Last February, a report was rendered on the case which was heard before a Commissioner of the U.S. Court of Claims. Subsequently, the Williams and Wilkins Company proposed a new subscription rate schedule for institutional recipients which includes an automatic photocopying license for library patrons and a royalty of five cents per page for articles copied for interlibrary loan.

We have indicated our willingness to pay higher subscription rates; however, we cannot accept the implication that a license for photocopying is necessary. We are therefore faced with the prospect of lapsing the Library's subscription to your journal.

For many years, the National Library of Medicine has indexed the articles contained in your journal and we would be pleased to continue to do so in the future. However, if we are not able to obtain a regular subscription this will no longer be possible unless some other means of acquiring your journal is found.

I thought you should learn in advance why we may no longer be able to index your journal rather than have you discover this after the fact.

Sincerely yours,

MARTIN M. CUMMINGS, M.D.,
Director.

EXHIBIT 10

THE WILLIAMS & WILKINS CO.,
Baltimore, Md., October 2, 1972.

TO OUR CUSTOMERS AND FRIENDS: After many discussions with librarians, administrators, scientists, and scholars, The Williams & Wilkins Co. has arrived at an arrangement concerning the photocopying of copyrighted material which we hope you and the rest of your library staff will find appropriate.

BACKGROUND OF W&W POSITION

First, let us say that we have been publishing medical journals since 1909 and it is our hope and intention to continue doing so for as long as we are able. In most instances, the journals we publish have made modest earnings for their societies as well as a fair margin of profit for The Williams & Wilkins Company. This, we feel, is a reasonable and proper situation. We also feel, and have always felt, that our function as publishers is an important and necessary one to the rapid dissemination of scientific information. Neither the medical society nor The Williams & Wilkins Company is in the publication business to make a quick killing or exorbitant profits. But as publishers and businessmen, we would be remiss if we did not consider all the factors that influence the economic viability of our journals. For when this economic viability is threatened, so too is the very existence of the journals and their role in the spreading of vital medical and scientific information. Over a period of time, an exhaustive analysis of the situation convinced us that uncompensated photocopying could lead to the demise of the scientific journal as we know it. We did not, and do not, wish to discourage scholars and physicians from photocopying journal articles. In fact, we encourage this as a most logical and practical method of disseminating information. It is our contention, however, that the costs of the journal must be spread equitably among all its users to offset the losses in revenue due to dwindling subscriptions.

W&W VERSUS THE UNITED STATES

To establish this principle, we eventually found it necessary to bring suit against the federal government. In February 1972, Commissioner James Davis of the U.S. Court of Claims ruled in favor of The Williams & Wilkins Co., thereby upholding our contention that we are entitled to "reasonable and entire compensation for infringement of copyrights." Our action following this decision has been consistent with our long term objectives, which are to continue publising journals and thereby serve the scientific community, while earning revenue for their societies and a reasonable profit for ourselves.

W&W'S FIRST PROPOSAL

Instead of resolving the copyright situation, however, Commissioner Davis' ruling seemed only to generate hostility and confusion. Part of this confusion, we must confess, was brought about as a result of our own action. Since we deemed it desirable to implement the ruling as soon as possible, The Williams & Wilkins Co. established a plan that would spread the cost of our journals among all of their users while continuing to allow the unimpeded flow of knowledge. As you know, our plan called for a modest rise in the journal subscription rate to institutions which would include a reproduction license. In return for this license—which, incidentally, averaged less than four dollars for the 56 year term of the copyright—we proposed to allow unlimited single-copy reproduction of all articles, current and past, in journals published by The Williams & Wilkins Co. carrying an institutional rate. (For a complete list of these journals, please see enclosure.) In addition, the plan called for a five-cents-per-page fee for inter-library loan reproductions. Since it is our position that a Commissioner's ruling, unless reversed, has the full weight of law, it seemed logical that we proceed from his decision by requesting that the institutional reproduction fee be paid. Perhaps naively, we did not anticipate the strenuous objections by some segments of your library community. Until the government's appeal has been processed, it is their contention that the ruling does not have the weight of law and that compliance with our new procedures would imply acceptance of our position.

REACTION TO THE PROPOSAL

To further complicate the situation, during the months following our proposed plan announcement, much confusion and conflicting reports circulated as to our intentions. Some exaggerated charges stated that our subscription rates would soar to four or five times what they are at present; it was charged that burdensome bookkeeping would be required by librarians; some claimed that we even wished to curtail the practice of photocopying altogether. As a result of these charges, an atmosphere of distrust was created with both sides maintaining that they could not compromise their legal positions. In a letter to The Williams & Wilkins Co. of July 31, 1972, the National Library of Medicine, stated that it is its position that it would accede to a rise in price based on an institutional rate to all libraries, great and small, but could not accept the implication that a license for photocopying is necessary.

THE SOLUTION

In order to allow the NLM and all libraries to subscribe to W&W journals at increased rates and include them in *Index Medicus*, we now accept the NIH–NLM position. Our new institutional rates, which we shall continue to request, shall have no connection whatever with a license to photocopy, implied or otherwise. In short libraries may continue to supply their uses with royalty-free, single-copy reproductions of W&W journal articles as they have done in the past.

As stated many times, we have no desire to obstruct the dissemination of scientific information between library and scholar, which would certainly be the result of cancellation of subscriptions. Further, in the same spirit, we are, again without prejudice, withdrawing our proposal for the five-cents-per-page inter-library loan fee until the appeal of our case has been heard. In the meantime, we hope to work with libraries in an effort to develop a solution which will be mutually acceptable. Both of these concessions have been made with a sincere desire to see that there is no interruption whatever to the flow of scientific information between you and your patrons which would result from subscription cancellations. We are sure this desire coincides with your own objectives.

To facilitate greater cooperation, please feel free to call Mrs. Andrea Albrecht collect, c/o The Williams & Wilkins Company, with any questions, comments, or suggestions you may have.

Sincerely,

William M. Passano,
Chairman of the Board.

JOURNALS WHICH CARRY BOTH AN INSTITUTIONAL RATE AND AN INDIVIDUAL RATE[1]

Acta Cytologica ($19.50)
American Journal of Physical Medicine ($14.00)
Current Medical Dialog ($11.00)
Drug Metabolism and Disposition ($42.00)
Fertility and Sterility ($33.00)
Gastroenterology ($35.00)
Investigative Urology ($22.50)
Journal of Criminal Law, Criminology and Police Science ($18.50)
Journal of Histochemistry and Cytochemistry ($33.00)
Journal of Immunology ($58.00)
Journal of Investigative Dermatology $(43.75)
Journal of Nervous and Mental Disease ($23.00)
Journal of Pharmacology and Experimental Therapeutics ($70.00)
Journal of Trauma ($27.00)
Journal of Urology ($40.00)
Laboratory Investigation ($45.00)
Medicne ($15.00)
Obstetrical and Gynecological Survey ($29.00)
Pediatric Research ($32.00)
Pharmacological Reviews ($18.00)
Plastic and Reconstructive Surgery ($30.00)
Radiological Technology ($11.00)
Soil Science ($23.00)
Stain Technology ($12.00)
Survey of Anesthesiology, ($13.00)
Survey of Ophthalmology ($26.00)
Transplantation ($43.00)
Urological Survey ($16.00)

NOTE.—Institutional rate in ( )

JOURNALS WHICH CARRY AN INDIVIDUAL RATE ONLY[2]

Cancer Research ($50.00)
International Journal of Gynaecology and Obstetrics ($10.00)
Journal of Neurosurgery ($35.00)
Journal of Biological Chemistry ($120.00)
Applied Spectroscopy ($15.00)
British Journal of Plastic Surgery ($14.00)
British Journal of Surgery ($28.50)
British Journal of Urology ($16.50)
British Veterinary Journal ($20.00)
Clinical Radiology ($18.00)
Community Health ($12.15)
Comparative and General Pharmacology ($40.00)
Dental Practitioner ($12.15)
Injury ($17.85)
Insect Biochemistry ($40.00)
International Journal of Biochemistry ($40.00)
Tubercle ($19.85)

NOTE.—Non-Institutional rate in ( )

EXHIBIT 11

THE WILLIAMS & WILKINS CO.,
Baltimore, Md., Jan. 11, 1973.

DEAR LIBRARIAN: On October 2nd, 1972, we sent you a detailed account of our changed thinking about licensing the photocopying of copyrighted materials, in light of the unfavorable responses generated by our original position. That letter covered the background of our beliefs about photocopying; our suit against the Federal Government; Commissioner Davis's opinion; our first proposal; and the reaction to that proposal from members of your profession. We concluded with a solution to the problem which, to the best of our knowledge, has proved acceptable to the entire library community.

However, we should like to re-state that solution, as there are still some misconceptions about our changed position.

1) We accept the position advocated by the NIH–NLM.

2) Our new institutional rates (see enclosed rate sheet), have no connection with a license to photocopy, implied or otherwise.

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[1] These journals are published by The Williams & Wilkins Co. and in most cases the copyright is in the name of W&W.

[2] These journals are published by others for which the Williams & Wilkins Co. performs certain services under contract. Policy is set for those journals by their proprietors and is not within the province of W&W. The exception is the International Journal of Gynaecology and Obstetrics which is published by W&W but carries no institutional rate.

3) Libraries may continue to supply their users with royalty-free, single-copy reproductions of our journal articles.

4) We have withdrawn, without prejudice, our proposal for the five-cents-per-page inter-library loan fee for copying.

We hope that this will help clear up any doubts that you may have had about our subscription rates and our attitude toward photocopying.

Sincerely yours,

PATRICIA H. MORRIS,
Subscription Manager.

EXHIBIT 12

APRIL 30, 1973.

DR. MARTIN CUMMINGS,
Director, National Library of Medicine,
Bethesda, Md.

DEAR DR. CUMMINGS: We at Williams & Wilkins are most anxious to see a solution to the interlibrary loan problem. We realize that the problem must be solved to the satisfaction of the medical libraries as well as to ourselves. Since my last visit with you, I and my colleagues have given much thought to the subject.

Let me tabulate some of the requirements which in our opinion must be met if a plan is to be mutually satisfactory.

1. It should not require record keeping or accounting on the part of the libraries over and above what they are doing at present.

2. It should recognize that photocopying is a valuable library tool which should be utilized whenever the professional librarian believes that it is useful.

3. It should compensate the scientific journals for the loss of subscription income which is the result of the interlibrary loan procedure.

4. Our established institutional rate should include this compensation and our permission for reprography for interlibrary loan and over-the-counter copying.

5. The monies collected under the plan should be built into the subscription price of the journals and should be related to the basic institutional rate so as to assure that future variations will be in direct proportion to changes in that basic rate.

To satisfy these requirements we have developed the following plan:

The subscription price to the 11 Regional Libraries for the 1974 journals will be no greater than twice the institutional rate and for the Medical School Libraries and the 500 ± medical libraries involved in the interlibrary loan operation no greater than one and one half times the institutional rate.

In all instances where libraries of any size subscribe to two or more copies of a journal the additional copies will be billed at the individual subscriber rate. This is with the understanding that the additional copies are for intramural use and are not to be turned over to a branch of the parent library or any other separate institution.

We fully realize that the success of this (or any other) plan is primarily dependent on its meeting with the approval of NLM and upon NLM's willingness to recommend it to the medical libraries throughout the country. The details of the plan (but not its principles) should be subject to adjustment as industry-wide surveys make available additional knowledge of interlibrary loan operation.

It is our firm belief that you and we agree on the realities of this situation and that there is a genuine desire on both sides to arrive at an amicable and satisfactory solution to the problem. We offer this as such a solution and we await with interest your reaction to it.

Most sincerely,

DANIEL H. COYNE,
President, Publishing Services Division.
WILLIAM M. PASSANO, Sr.,
Chairman of the Board.

Mr. BRENNAN. The next witness and the last witness on this issue is the president of the Authors League.

STATEMENT OF JEROME WEIDMAN, PRESIDENT, THE AUTHORS LEAGUE OF AMERICA, INC.: ACCOMPANIED BY IRWIN KARP, COUNSEL

Mr. WEIDMAN. Mr. Chairman and members of the subcommittee, my name is Jerome Weidman. I am president of the Authors League of America, a national society of professional authors and dramatists. The Authors League appreciates this opportunity to present its views on problems of library photocopying related to the copyright revision bill.

The Authors League has submitted a statement on the problem of library photocopying and I respectfully request that it be included in the record.

Senator McCLELLAN. It will be included.

Mr. WEIDMAN. Thank you.

With your permission, I would like to summarize my statement, and comment very briefly on it. I am accompanied by Mr. Irwin Karp, who is counsel of the Authors League of America.

Senator McCLELLAN. Very well.

Mr. WEIDMAN. This morning, spokesmen for the publishers of scientific and technical periodicals, discussed the effects of uncompensated library copying. The Authors League shares their view that such uncompensated reproduction of their articles is damaging and that the damage will increase. Much of their testimony naturally focused on how library copying of scientific articles affected publishers.

However, library photocopying has also an adverse economic effect on professional authors. These authors earn all of or a substantial part of their income from writing. After their works first appear in periodicals or books, they are often reprinted—with the author's permission—in anthologies and textbooks. Many authors earn much of their income from such reprinting.

Poets and essayists, for example, receive very little when a poem or essay is published in a periodical. But they may license several different publishers to reprint it in anthologies, or collections. And although each fee is small, the accumulation of fees can produce a modest reward for work of substantial literary value.

Under the proposed exemption, libraries could reproduce single copies of poems and articles without compensation to the author. These copies can replace several copies of an anthology or book in a library or college book store. Authors must be compensated for uses of their works by audiences reached by this new process. Otherwise, they will be deprived of substantial portions of their incomes.

It must be emphasized that this one-time reprinting involves unlimited copying. Under the libraries proposed exemption, any library could reproduce many copies of an entire article—one copy for each of the several individuals who orders it.

Our dispute with the libraries does not involve all library copying. The controversy centers on the libraries' claim that they must be permitted to reproduce reprints of entire articles on any subject. Moreover, the heart of controversy, is not whether they should be permitted to engage in this copying—but whether copyright owners should be compensated when libraries reproduce copies of their works.

Copyright owners have emphasized that the only real issue is reasonable compensation for library copying of their articles. Copyright owners have accepted the principle that workable clearance and licensing conditions should—and can—be established to provide reasonable compensation to copyright owners.

The House Judiciary Committee said this is the fair and rational solution to the problem. But library spokesmen have flatly rejected it. Therefore, the National Commission should recommend reasonable licensing systems.

We thank the subcommittee for this opportunity to present this statement.

Senator McCLELLAN. Fine. Thank you.

[The statement of the Authors League of America follows:]

SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS,
COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE,
July 31, 1973.

STATEMENT OF THE AUTHORS LEAGUE OF AMERICA ON "LIBRARY PHOTOCOPYING" AND S. 1361

Mr. Chairman and Members of the Subcommittee: My natme is Jerome Weidman. I am president of The Authors League of America, a national society of professional authors and dramatists. The Authors League appreciates this opportunity to present its views on problems of "library photocopying" related to the Copyright Revision Bill. May I request that this statement be included in the record?

We respectfully recommend to the Subcommittee that:

1. The library associations' proposal for a "library reproduction" exemption should be rejected.

2. The National Commission on New Technological Uses of Copyrighted Works should be established; and it should investigate and make recommendations as to

   (*a*) "workable clearance and licensing conditions" for the library reproduction of copyrighted works, the solution recommended by the House Judiciary Report, in those words; and

   (*b*) "such changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners."

3. Sec. 108 should be revised to eliminate ambiguities which would destroy the rights of authors and publishers.

4. Section 107 should be retained. However the judicial doctrine of fair use (which it simply reaffirms) should not be expanded by interpretation, in the Committee report, to "normally" include so-called "single-copy" reproduction of an entire article.

THE DEMAND FOR A LIBRARY REPRODUCTION EXEMPTION

The Association of Research Libraries and the American Library Association seek an exemption (through a new Sec. 108(d)(i)) permitting libraries or archives (i) to reproduce copies of articles and portions of books and (ii) to reproduce, under loose conditions, copies or phonorecords of entire books or other copyrighted works. Similar exemptions have been proposed in the past and rejected by this Subcommittee and by the House Judiciary Committee. For the reasons discussed below, the Authors League urges the Subcommittee to reject the library associations' current effort to create this damaging limitation on the rights of authors and other copyright owners. "Copyright Owners", it should be noted, include authors, non-profit societies which publish technical and scientific journals (e.g. American Chemical Society), non-profit publishers of books and journals (e.g. the university presses represented by The Association of American University Presses), and for-profit publishers.

The Context of the Issues

Clause (1) of the proposed library exemption would allow libraries to engage in unauthorized, uncompensated "one-at-a-time reprinting" of entire articles, and portions of books and other works.

"One-at-a-time reprinting" is not an argumentative or pejorative term. It is a phrase used by experts to describe the process of disseminating articles, chapters from books, and entire books to readers and users—by reproducing a single reprint to fill each individual order. Each copy, made by Xerox or other process, is an exact reprint of the original—line by line, letter by letter, as originally set in type. The process of one-at-a-time printing is now well-established. It is used by commercial reprint publishers, such as University Microfilms, to supply copies of older books to individual customers,[1] it is used by journal publishers; and it is vigorously employed by several large libraries which serve as reprint centers for the patrons of many other libraries.

The process involves unlimited reproduction of copies of a given article or other work. The reprint publisher produces one copy for each order; but it produces as many copies of a work as there are orders for it. Similarly, under clause (1) of the librarians' proposed exemption, any library could reproduce many copies of an entire article or portion of a book—one copy for each of the several individuals who orders it. And any library could reproduce many "single copies" of each article in a periodical issue, so long as it provided one copy per order.

The Issues—And Positions of the Parties

Copyright owners agree that certain copying of copyrighted works can be done by libraries without permission or compensation—i.e. copying which falls within the scope of fair use. And librarians agree that some library reproduction of copyrighted works is, and should be, copyright infringement.

But there is sharp disagreement over library reproduction of entire articles, and similar portions of entire books. Library spokesmen demand that libraries be permitted to reproduce copies of any article and distribute them, one-at-a-time, to persons who order them, without the copyright owner's permission or compensation. While library spokesmen have focussed their demand on scientific technical and scholarly articles, their proposed exemption would give libraries the power to reproduce copies of any article or "similarly" sized portion of any book or other work.

Libraries seek power to reproduce these copies without compensation to the copyright owner—even though (1) copies are available from the copyright owner, directly or through its licensed reproduction service, or/and (2) the copyright owner will authorize the libraries to make the copies, provided reasonable compensation is paid to the copyright owner under "workable clearance and licensing conditions."

Copyright owners contended that such unauthorized, uncompensated library reproduction of entire articles and "similarly" sized portions of entire books and other works is not permitted, and should not be permitted, under the Copyright Act. They have made it clear that the only real issue is reasonable compensation to copyright owners for library one-at-a-time reprinting of their articles and other works. Copyright owners have accepted the principle that "workable clearance and licensing conditions" should—and can—be established to authorize libraries to produce copies of these materials, and to provide reasonable compensation to copyright owners.

"Workable clearance and licensing conditions", as the House Judiciary Committee emphasized (Rep. 83, p. 36) are the fair and rational solution to the problem. But library spokesmen have flatly rejected it—in discussions with representatives of copyright owners, and in their current demand for an exemption permitting this type of one-at-a-time reproduction by libraries. Library spokesmen have contended that copyright owners must not be compensated. Their position poses two paradoxes. First, libraries do pay to reproduce copies of entire articles and other works; they pay the Xerox company and other manufacturers of equipment and supples very handsome compensation for providing the tools of one-at-a-time reprinting; they pay their employees for the work involved in producing the copies; the reprinting libraries often charge substantial amounts to other libraries for reproducing copies for their patrons. Second, librarians are deciding that public funds or funds provided by tax-deductible contributions should not be used to compensate those who make their one-at-a-time reprinting possible—the copyright owners who produce the articles and books that are the grist for their reproduction mills. By contrast, librarians have also made the decision that the cost of producing the copies must be absorbed by libraries, and no charge made to the readers and users.

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[1] University Microfilms secures licenses from the copyright owners and pays them royalties.

The Proposed Library Exemption Destroys the Balanced Solution Envisioned by Congress

The reports of the House Judiciary Committee, and the draft Report of this Subcommittee, envisioned a 3-part solution to the problems of library copying which would serve the legitimate needs of library patrons, protect the right of copyright owners to reasonable compensation for the use of their property (and for their investment and work in creating it), and preserve the independent, entrepreneurial system of creating and disseminating works of literature, science, technology and art. The solution is based on three components: (1) fair use; (2) "workable clearance and licensing conditions", and (3) the principle of "availability", underlying Sec. 108 of S. 1361. The librarians' proposed library reproduction exemption destroys this balanced solution.

(1) Fair Use

As the House Judiciary Report, and the draft Report of this Subcommittee indicate, the doctrine of fair use applies to libraries; and library copying which is a fair use can be done without the permission or compensation of the copyright owner. The House report said: "Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all the applicable criteria and the facts of the particular case." (H. Rep. No. 83, p. 36).

A principle purpose of the proposed library reproduction exemption is to alter that concept, and permit all library copying of entire articles and similarly sized parts of books and other works. If the library exemption simply authorized copying which was fair use, it would be unnecessary, and should be rejected to avoid confusion. To the extent that it permits unauthorized, uncompensated library copying which exceeds fair use, the exemption should be rejected because "it is more sweeping than is necessary", and—would wreak great injury on copyright owners, while at the same time destroying the balanced solution that would fairly serve the legitimate rights and needs of all concerned.

The proposed library exemption seeks to legalize the very type of uncompensated library reproduction of entire articles which Commissioner Davis held was infringement, and not fair use in Williams & Wilkins v. United States. His opinion carefully analyzed—and rejected—the claims of the American Library Association and Association of Research Libraries that such wholesale copying was fair use. His findings and opinion were appealed by the government to the Court of Claims and its opinion is awaited. But regardless of the outcome, the Authors League contends that such unauthorized, uncompensated one-at-a-time reprinting of entire articles should not be permitted by the Copyright Act, because of its unfair and damaging impact on copyright owners, and the independent, entrepreneurial copyright system of disseminating such works. It is precisely this type of library reproduction which, the House Report emphasized, should be conducted under "workable clearance and licensing conditions"—with payment of reasonable compensation to copyright owners.

(2) "Workable Clearance and Licensing Conditions"

The House Judiciary Committee prescribed "workable clearance and licensing conditions" as the second component of a balanced solution. It urged all parties concerned "to resume their efforts to reach an accommodation." Some librarians have recognized that a clearance and licensing system, with reasonable payment to copyright owners, is the rational method permitting library reproduction of copies of entire articles and similarly sized portions of books. Copyright owners have accepted this principle, and have sought to develop such systems in cooperation with library spokesman. The latest effort occurred in March, 1973 when representatives of learned societies, university presses, authors and other journal publishers met in Washington with a large group of library spokesmen, including representatives of The American Library Association and Association of Research Libraries. For two days the group discussed various aspects of clearance and licensing systems for library reproduction of journal articles. Plans were made for a subcommittee to continue the work. But the entire effort collapsed because too many library leaders stubbornly adhered to their earlier position that libraries must have the power to engage in uncompensated reproduction of copies of journal articles—and that copyright owners must be denied compensation. They refused to continue the joint effort.

The stubbornness and unreasonableness of library spokesmen should not be rewarded by giving their constituents, the libraries, the power to engage in uncompensated reproduction of articles and similarly sized portions of books. Such reproduction can be done under fair clearance and licensing systems. And those systems can be developed by the machinery designed by this Subcommittee for that purpose—The National Commission on New Technological Uses of Copyrighted Works.

Moreover, the proposed library exemption is a totally unnecessary abrogation of copyright owners rights, in view of the principle of "availability".

(3) *The Principle of "Availability"*

Section 108(d) permits libraries to reproduce—for their patrons, or patrons of other libraries—single copies of any work that is not "available" from designated sources. As indicated below, The Authors League believes that certain revisions should be made in the section to remove ambiguities that would deprive copyright owners of essential rights. However, the principle of "availability" assures that the patrons of libraries can obtain reprints of entire journal articles and similarly sized portions of books. If the copyright owner will not provide a copy of the article, directly or through its authorized reproduction service, the library may produce a reprint, without permission or compensation.

In a series of meetings held in 1972, representatives of journal and book publisher, and authors, met with library representatives to discuss Sec. 108 and the principle of availability. Library spokesmen indicated that their principal concern was assuring that reprints of scientific, technical and scholarly articles were "available"—i.e. could be provided—to patrons who requested them. Some library spokesmen also recognized that library reproduction of copies of these articles should not be permitted where the journal publisher was making copies available directly, or through its authorized reproduction service. A proposed revision of Sec. 108(d), suggested by a library representative, was drafted. Although it would have increased the obligations of publishers under Sec. 108 to assure "availability" of reprints of articles, it was summarily rejected by The American Library Association and Association of Research Libraries. The reason is simple: their spokesmen insist that libraries must be permitted to reproduce copies of articles without compensation even though the journal publisher is making copies available, directly or through an authorized reprint service. This destruction of the copyright owner's right, and denial of needed income, cannot be justified under the principle of "availability." Where the copyright owner provides copies of the article, as many publishers do, libraries should not be allowed to engage in uncompensated reproduction of these copies. If libraries wish to provide copies to patrons faster than the publisher does, then they should work with copyright owners to establish "workable clearance and licensing conditions."

However, library spokesmen—with some notable dissents—have arbitrarily rejected the 3-part balanced solution. They will have no part of "workable clearance and licensing conditions", or a reasonable concept of "availability" which allows uncompensated library reproduction only when the publisher is not providing copies. They continue to demand the power to engage in uncompensated reproduction of journal articles and similarly sized portions of books, despite the serious injury this would inflict on copyright owners and the copyright system.

The Library Exemption Would Injure Copyright Owners and the Copyright System

(i) Unquestionably, the proposed library reproduction exemption would reduce subscribers to scientific, technical and scholarly journals by libraries, who are their principal subscribers (and by individual subscribers). Librarians have candidly admitted that this is the purpose of library reproduction of journal articles. The attrition occurs at two levels. Some libraries took multiple subscription to heavily used journals so that several patrons could use them at the same time. Now one subscription suffices, since it is used to reproduce copies of articles for each user who wants them.

(ii) On the second level, library reproduction of journal articles allows many libraries to eliminate all subscriptions to many journals. When patrons of these libraries want an article, the library forwards the order to a central library which reproduces a single copy of the article for the patron. Library spokesmen, with a penchant for confusing euphemisms (e.g., they label unlimited library copying of articles as "single copying" because the copies are produced one-for-a-customer) blithely characterize these reprint transactions as "interlibrary loans". In truth, no loan is involved. The reprint is supplied to the patron who ordered, and he keeps it—it is his property. Admittedly, library reproduction of journal articles is designed to permit a few libraries to serve as one-at-a-time reprint services providing copies of articles to many other libraries who will not have to subscribe to these scientific, technical or scholarly journals. The government libraries involved in the Williams and Wilkins case engaged in this "wholesale" one-at-a-time reprinting of journal articles. Each year, their Xerox machines churned out thousands upon thousands of reprints of journal articles—one-at-a-time—to fill the orders of patrons of other libraries as well as their own patrons.

Under these circumstances, the proposed exemption is bound to deprive journal publishers of income from subscriptions that are not renewed, and additional subscriptions that are not placed because of library reproduction of their articles.

(iii) Moreover, the proposed exemption would deprive journal publishers of compensation for uses of their works by audiences reached by the new process of dissemination—one-at-a-time reprinting of articles. Doctors, engineers, scientists in every field and other potential readers can survey the contents of many journals through abstracts—then order reprints of the particular articles that interest them. They are not readers of "journals". They are an audience served directly by reprints of articles. This process of dissemination will continue to expand, for each journal article is a separate (and separately copyrightable) work, unrelated to the other articles in the issue. One-at-a-time reprinting permits users to acquire copies of only the particular works—i.e. separate articles—they want to read.

Similar developments of new processes for disseminating literary, musical and dramatic works have occurred frequently: e.g., motion pictures and television (to supplement the stage), the phonograph record, radio and tape recordings (to supplement sheet music). The paperback book revolution created a process of disseminating books—in low priced editions, through mass distribution—to an audience many times greater than that reached by the convention method of distribution, hard-cover "trade" editions.

Until now, authors and publishers have been compensated for uses of their works by audiences reached through these new processes of dissemination. However library spokesmen now ask Congress to impose an exemption which would deprive journal publishers of payment for uses of their works by the increasing audience reached by the one-at-a-time reproduction of their articles. This means that innumerable readers who will benefit from the publisher's work in editing, printing and distributing its journals will not help defray any part of the publisher's cost of doing the work which made the articles "available" in the first place. These costs continue to rise, though subscriptions remain static, or decline. Deprived of income which they need and are entitled to receive, publishers will be obliged to discontinue many scientific, technical and scholarly journals.

(iv) The proposed library exemption would also damage authors of poetry, fiction, and books and articles on current political and social problems, biography, history and a wide range of subjects. After these works first appear in periodicals or books, they are often reprinted—with the author's permission—in anthologies, text books, periodicals and other books (such as collections of an author's poetry, short stories or articles). Many authors earn a substantial part of their income from such *reprinting* of their works. Indeed, some earn the major part of their compensation in this manner. Poets and essayists, for example, receive very little when a poem or essay is published in a periodical; but they may license several different publishers to reprint the poem or essay in anthologies or collections. And although each fee is small, the accumulation of fees can produce a modest reward for work of substantial literary value. Authors of books also earn a significant part of their compensation, in many instances, from permitting the reprinting of excerpts—of similar size to periodical articles—in anthologies, textbooks and other collections.

Under the proposed exemption, libraries—including college and university libraries—would have the power to reproduce single copies of poems, articles and sections of books, without compensation to the author. The process of supplying these copies—e.g. one to each student in a university class in literature or political science—can replace several copies of an anthology or book in the library, or several copies of a paperback collection or text in the college bookstore. Unless authors are compensated for uses of their works by audiences reached by the new process of one-at-a-time reprinting, they will be deprived of a substantial portion of their income.

(v) As we have noted, the proposed library exemption would permit an accumulation of uncompensated copies of a given article or similarly sized excerpt from a book. Any one library could reproduce several copies of the work, "one-at-a-time." And many libraries could do the same thing. "Isolated instances of minor infringements," as the Subcommittee's draft report noted, "when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." Library spokesmen argue that uncompensated library reproduction poses no threat to publishers and authors. But in 1967, according to the *Sophar & Heilpron* report for the Office of Education, "It is estimated that in 1967 one billion copyrighted pages were copied in the U.S."

The library spokesmen can hardly guarantee that the proposed exemption will not seriously injure publishers of journals, or authors. Moreover, the proposed exemption does not, and could not, draw a line—limiting the injury a publisher or author would suffer before libraries will cease one-at-a-time reprinting of his articles or portions of his books. And in the light of copyright history, it is dangerous to assume that the process of uncompensated library copying will not inflict substantial damage. Starting with the phonograph record, every new process of dissemination was greeted initially by the same "it's not a real threat" attitude the library spokesmen have voiced on the techniques of one-at-a-time reprinting.

(vi) One of the gravest dangers of the proposed library exemption is the adverse effect it will have on independent, entrepreneurial system for creating, publishing and disseminating journals, books and other works. The "economic philosophy" underlying the copyright clause was that such a system was preferable to patronage by governments or wealthy institutions. Because the copyright owner was entitled to compensation from users of his work, he could make the expenditures necessary to create, edit, publish and disseminate it. Through the payment of royalties and other compensation, users in effect shared in defraying the costs of producing the materials they desired. But, as we have noted, proposed exemption would deprive journal publishers, and authors, of substantial part of this needed income—compensation for uses of their works by audiences reached by the one-at-a-time production of their articles or portions of their books. It is regrettable that library spokesmen refuse to recognize the serious danger their exemption poses to the independent, entrepreneurial system of publication and dissemination which is essential to them, and—more importantly—to their patrons.

(vii) It should be noted that library reproduction of articles is not merely "note taking", nor a substitute for copying by individual readers. Persons who obtain reprints of articles from a library copying service or the publisher are not taking handwritten notes. They are acquiring reprints of printed articles, 10, 20, 30 or more pages long—just as they buy or acquire other published materials, to avoid the dozens of hours it would take to copy that much by hand. Nor could library patrons reproduce the copies themselves. Many patronize libraries that do not have the journals: the copies are reproduced for them by other libraries dozens or hundred of miles away. And where the patron's own library subscribes to the journal, it will produce and deliver a reprint of the article he wants (rather than lend the journal)—so that it can keep its one issue available to reproduce copies of articles for other patrons, and avoid losing this reprint master through wear and tear, readers' negligence, or theft.

The "Philosophical" Arguments

In the past, the librarians have accompanied their demand for the proposed exemption with an assortment of "philosophical" arguments: e.g., copyright is a monopoly, it is not property but a "privilege." Should it become necessary to respond to these familiar gambits, we respectfully direct the subcommittee's attention to our accompanying statement on the "Educational Exemption," demanded by the National Education Association and other groups.

THE NATIONAL COMMISSION

Although the House Judiciary Committee Report urged the parties to jointly develop "workable clearance and licensing conditions," efforts to do so have collapsed because library spokesmen opposed this phase of a fair and balanced solution to the problem of library photocopying.

It is therefore essential that the National Commission on New Technological Uses of Copyrighted Works be established. And that the Commission proceed, as intended by Title II of S. 1361, to study and make recommendations as to "workable clearance and licensing conditions" for library reproduction of articles and similarly sized portions of books and other works. Much of the information is already available. Practical proposals have been made by various informed individuals, including librarians who favor a licensing system. There are no real obstacles to a reasonable solution—except the position of library spokesmen that authors and publishers are not entitled to any compensation for library one-at-a-time production of their articles and similarly sized portions of their books.

REVISION OF SECTION 108

Sec. 108 (d) would permit uncompensated library reproduction of copies of any work when an unused copy "cannot be obtained at a normal price from commonly known trade sources in the United States including authorized reproducing services." There are certain ambiguities in the section which could seriously damage the rights of authors and publishers. These involve such questions as what "trade sources" are included, what time intervals make the privilege operative, and what is a normal price. A careful and thorough analysis of these ambiguities has been prepared and submitted to the Subcommittee by the firm of Linden and Deutsch. Their memorandum indicates the principal difficulties posed by the section; and we respectfully urge that it be revised to overcome them. We also urge that the revision incorporate the suggestions made by the Association of American Publishers. Finally we urge the revision take account of the difference between various categories of works. Many literary works, for example, are reprinted periodically, as the demand for the work warrants it. If libraries could reproduce copies during these intervals because a copy was not available from trade sources, this could eliminate the possibility of any further reprintings—depriving authors and publishers of income. It would appear that the problems posed by Sec. 108 (c) and (d) could be solved more readily by the Commission; and that it might be preferable to enact Sec. 108, pending the Commission's recommendations, in the form enacted by the House of Representatives.

THE SUBCOMMITTEE'S INTERPRETATION OF FAIR USE

As the Subcommittee's draft report indicates, Sec. 107 of S. 1361 "is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way." We have always supported this interpretation of the section's purpose. The draft report further states "Library copying must be judged a fair use or an infringement on the basis of all the relevant criteria and the facts of a particular situation." This is a correct statement of the application of the fair use doctrine to library copying—paralleling the view of the House Judiciary committee, quoted above. However, the draft report then states; "While it is not possible to formulate rules of general application, the making of a single copy of an article in a periodical or excerpt from a book would normally be regarded as fair use." We believe this sentence is not a correct application of the doctrine of fair use, and contradicts the view of the Subcommittee and the House Judiciary Committee that library copying, like other copying, must be judged for fair use purposes on the basis of all the relevant criteria and the facts of a particular situation. We have discussed the damaging consequences of library reproduction of so-called single copies, which cannot be considered a fair use under all the relevant criteria. Moreover, library reproduction of single copies is, in reality, a process which produces many copies. The crux of Commissioner Davis' opinion in the *William & Wilkins* case was that the copying done by the government libraries—one-at-a-time—"is wholesale copying and meets none of the criteria of fair use." We doubt the sentence in question was intended to condone such copying as fair use. But it may be read that way. We respectfully urge that the senence be deleted. This would be consistent with the fundamental premises adopted by this Subcommittee and The House Judiciary Committee that fair use is a judicial doctrine ("restated" in Sec. 107) and that library copying must be judged, like all other copying, by applying the criteria to the facts of a particular situation.

We thank the Subcommittee for this opportunity to state the views of The Authors League on these vital issues.

JEROME WEIDMAN.

Senator McCLELLAN. Now this brings us to the conclusion of the witnesses that were scheduled for this morning's session. We are only a few minutes overtime. We compensated for our lateness in starting by coming back at 1:30 o'clock. It is now almost 2.

I hope now we can move expeditiously so that we can conclude by 4 o'clock because I do have to leave at that time.

All right. Call the next witness.

Mr. BRENNAN. Mr. Chairman, the issue for the afternoon session is the proposed ad hoc committee amendment for a general educational exemption. Forty minutes have been allocated to the proponents of the amendment, the ad hoc committee.

Would you all please come forward?

Senator MCCLELLAN. Forty minutes is also allotted to the opposition.

Mr. BRENNAN. Mr. Chairman, I request that the text of the proposed amendment appear at this point in the record.

Senator MCCLELLAN. This is the amendment to be proposed by the witnesses now appearing?

Mr. BRENNAN. That is correct.

Senator MCCLELLAN. All right, this amendment will appear immediately after you gentlemen are identified in the record. Then the amendment you sponsored may be printed in the record.

Mr. BRENNAN. Dr. Wigren, would you introduce yourself for the record?

STATEMENT OF THE AD HOC COMMITTEE OF EDUCATIONAL INSTITUTIONS AND ORGANIZATIONS ON COPYRIGHT LAW REVISIONS, HAROLD E. WIGREN, CHAIRMAN; ACCOMPANIED BY ALFRED CARR, LEGISLATIVE CONSULTANT, NATIONAL EDUCATION ASSOCIATION; ROBERT F. HOGAN, EXECUTIVE SECRETARY, NATIONAL COUNCIL OF TEACHERS OF ENGLISH; RICHARD J. SCHOECK, DIRECTOR OF RESEARCH ACTIVITIES, FOLGER SHAKESPEARE LIBRARY OF THE DISTRICT OF COLUMBIA, ON BEHALF OF MODERN LANGUAGE ASSOCIATION; FRANK NORWOOD, EXECUTIVE SECRETARY, JOINT COUNCIL ON EDUCATION TELECOMMUNICATIONS; JOHN C. STEDMAN, PROFESSOR OF LAW, UNIVERSITY OF WISCONSIN; AUGUST W. STEINHILBER, DIRECTOR OF FEDERAL AND CONGRESSIONAL RELATIONS, NATIONAL SCHOOL BOARDS ASSOCIATION; AND HARRY N. ROSENFIELD, COUNSEL TO THE AD HOC COMMITTEE

Mr. WIGREN. Mr. Chairman and members of the subcommittee, we have everyone here, I think, except one of our witnesses, and he has been detained in another hearing, but he will be in shortly. I am going to ask, in the interest of time, that each of our panel members will introduce himself as we go through, if you don't mind? I think it might be easier.

Senator MCCLELLAN. All right. Just introduce yourselves, and place this proposed amendment in the record.

Mr. WIGREN. All right.

I am Harold E. Wigren, chairman of the ad hoc committee of 41 educational organizations.

Senator MCCLELLAN. Fine. The amendment to be proposed will be placed in the record.

[The amendment follows:]

Section . *Limitations on exclusive rights: Reproduction for teaching, scholarship and research*

Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright.

For purposes of this section,

(1) "use" shall mean reproduction, copying and recording; storage and retrieval by automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process;

(2) "portion" shall mean brief excerpts (which are not substantial in length in proportion to their source) from copyrighted works, except that it shall also include

(*a*) the whole of short literary, pictorial and graphic works,

(*b*) entire works reproduced for storage in automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process, *provided* that

(i) a method of recording retrieval of the stored information is established at the time of reproduction for storage, and

(ii) the rules otherwise applicable under law to copyright works shall apply to information retrieved from such systems;

(*c*) recording and retransmission of broadcasts within five school days after the recorded broadcast; provided that such recording is immediately destroyed after such 5-day period and that such retransmission is limited to immediate viewing in schools and colleges.

Provided that "portion" shall not include works which are

(*a*) originally consumable upon use, such as workbook exercises, problems, or standardized tests and the answer sheets for such tests;

(*b*) used for the purpose of compilation within the provisions of Section 103(a).

Senator McCLELLAN. Proceed.

Mr. WIGREN. I appear before you today, on behalf of the Ad Hoc Committee on Copyright Law Revision, which represents the interests of teachers, professors, school administrators, elected school board members, subject matter specialists, educational broadcasters, librarians and, most importantly, students themselves. Actually, we represent the only major organized group of nonprofit copyright users. Our clients are students, and they are completely dependent on the ease with which copyrighted information can be made available to them in reasonable proportions. In an information society, Mr. Chairman, the quality of their education is in your hands and the hands of the committee. A list of our members is attached to this statement (exhibit A). For the record I would like to point out that we support the testimony given by the library associations this morning. These groups are members of the Ad Hoc Committee on Copyright Law Revision.

I am accompanied today by a panel of representatives of members and participants in the ad hoc committee who will address themselves to particular aspects of our position. We will not dwell on some of the other concerns we have in the bill, but instead will concentrate on the main thrust of this hearing—namely, our proposal that a limited educational exemption be provided for teachers, scholars, and researchers to use materials for nonprofit purposes in carrying out their day-to-day work.

First, we would like to point out to the subcommittee the rationale for this limited educational exemption. During the past 8 years, the ad hoc committee has made every effort to maintain contact and dialog with publishers, authors, and materials producers to reach some type of accommodation which would take into account the interests of all parties concerned in the revision effort in order to strike a fair balance between the rights of proprietors and the rights of consumers/ users of materials.

Our discussions, however, have been frustrated by the impact of the recent ruling by Commissioner Davis of the U.S. Court of Claims in favor of Williams & Wilkins, in its copyright infringement suit against the National Library of Medicine. Commissioner Davis' report, in our judgment, has great impact not only on library operations but also on the ability of the educational community to gain access to the intellectual resources of this Nation. This ruling, if affirmed by the entire Court of Claims, would seriously limit the scope and meaning of "fair use." The Commissioner's ruling has caused considerable consternation and alarm within the educational community not only because of its effect on libraries but also because it would undercut the accepted and traditional meaning of "fair use" for teachers. The language and rationale are just as applicable against teachers and schools as against libraries.

Senator McClellan. I don't want to interrupt you, but I do think this question ought to be borne in mind, and I would like for some of you to give us an answer to it.

Is there any danger of this material drying up or being greatly diminished by reason of the inability of the producers to finance the costs of it unless they get revenues, additional revenues in some other way?

Mr. Wigren. Well, we think that we are creating markets for the author's works, and we think that the author needs us and we need him. We give his works visibility.

Senator McClellan. There is no question about that, but if they can't produce it, and get a return, at least on their investment, enough to keep them in business, you are not going to have the material.

Mr. Wigren. Well, we are asking for only minimal things in the course of teaching and learning that we feel will not undercut at all the ability of the publisher to make sufficient profit, which, of course, we think he should do.

Senator McClellan. But on the other hand, if they don't have anybody to subscribe for it, they are certainly not going to produce any of it.

Mr. Wigren. That is right.

Senator McClellan. So we have a problem. There has to be a little give and take here.

Mr. Wigren. We understand this and Congress needs to strike a fair balance between the rights of proprietors and the rights of users.

Because the *Williams and Wilkins* decision proves the unreliability of "fair use" for schools and libraries, the ad hoc committee urges Congress to adopt the concept of a limited educational exemption which would neutralize the harmful effect of the Commissioner's opinion on both schools and libraries and at the same time not be detrimental to publishers or producers of materials. In light of Williams and Wilkins, our request for a limited educational exemption is submitted to this committee not in lieu of "fair use" but in addition to "fair use" in the statutes. "Fair use" is generic in nature and is applicable to everyone—commercial and noncommercial user alike. Educational users need special protection over and above that provided commercial users because they have a public responsibility for teaching the children entrusted to them. They work for people--not for profit.

They do not use materials for their own gain, but for the benefit of the children of all of our citizens, including those of authors and publishers. This is the foundation stone for American education.

Now, the whole proposed language of the ad hoc committee's recommendation, including definitions and limitations, is attached to this statement in exhibit B. It is too long to read here because it takes up a whole page, but I respectfully request that it be inserted into the record.

Senator McCLELLAN. Let that also be inserted in the record.

Mr. WIGREN. Also I would like to request that exhibit A be inserted into the record——

Senator McCLELLAN. Let that also be inserted into the record.

Mr. WIGREN. In short, the ad hoc committee's recommendation would enable teachers to make copies or recordings for purely noncommercial classroom teaching purposes of the following, for example:

A short poem; a short story; an essay; a map.

An article from a magazine or newspaper.

A transparency of a chart from a newspaper or from a text for classroom use.

A transparency of a graph or diagram from a book, newspaper, or a magazine.

A TV or radio program which is used within 5 school days after the recorded broadcast, then erased.

A rendition of a school orchestra for the purpose of self-evaluation.

A recording of a musical excerpt for the purposes of study.

Excerpts or quotations (such as excerpts from contemporary writings in a duplicated examination).

The ad hoc committee is not asking for the right to copy an entire book or novel; a dictionary, reference book, musical score, encyclopedia, magazine, newspaper, pamphlet, or monograph; a motion picture or a filmstrip. The ad hoc committee is not asking for the right to make copies of materials originally consumable upon use, such as workbook exercises, problems, answer sheets for standardized tests; nor is it asking for permission to anthologize.

In conclusion, we would like to point out that the doctrine of "fair use" alone is insufficient, in our judgment, to provide the certainty that teachers and other nonprofit educational users of copyrighted materials need for their own protection, particularly in light of recent developments in the *Williams and Wilkins* case.

In the event that this subcommittee cannot grant our request, the ad hoc committee will be unable to support the proposed legislation (S. 1361) unless it is changed in two major respects: (1) unless the bill specifically provides adherence to the concepts and meanings of "fair use" which were written into House Report No. 83, of the 90th Congress, as amended in the following respects:

(*a*) The elimination of the expression "no matter how minor" in reference to the fourth criterion.

(*b*) The authorization for classroom purposes for limited multiple copying of short whole works, such as poems, articles, stories, and essays.

(*c*) The application of the full impact of "fair use" to instructional technology.

(2) Unless the decision of the Commissioner in the *Williams and Wilkins* case is specifically rejected to the extent in which it differs from that House report, as amended above.

The 41 organizations represented on the ad hoc committee have thrashed out their differences, and the position we take now at this hearing best states the preponderant view of our committee.

I turn now to the panel members. In the interest of time, I will ask each panel member to introduce himself to the subcommittee and indicate the needs and concerns of the organization or organizations he represents relative to the ad hoc committee's recommendation to the Congress.

Mr. Harry Rosenfield, to my left, is our counsel and we may call upon him during the question period.

Mr. ROSENFIELD. Mr. Chairman, before any other witness speaks, would it be possible to have the whole of each of these statements put in the record; they are being read in substance, and not in verbatim form.

Senator MCCLELLAN. We have so ordered this morning that any witness may have his entire prepared statement placed in the record and just highlight it and supplement it as he may choose.

[The statement of Harold E. Wigren in full follows:]

STATEMENT OF AD HOC COMMITTEE (OF EDUCATIONAL INSTITUTIONS AND ORGANIZATIONS) ON COPYRIGHT LAW REVISION BY HAROLD E. WIGREN

Mr. Chairman and Members of the Subcommittee: I am Harold E. Wigren, chairman of the Ad Hoc Committee (of 41 educational organizations) on Copyright Law Revision, a consortium covering a wide spectrum of organizations within the educational community which have joined to protect the public interest in the revision of the copyright law. I am a member of the staff of the National Education Association, and serve as the NEA's Educational Telecommunications Specialist. I appear before you today, however, on behalf of the Ad Hoc Committee on Copyright Law Revision, which represents the interests of teachers, professors, school administrators, subject matter specialists, educational broadcasters, librarians and, most importantly, students themselves. Actually, we represent the only major organized group of copyright users. Our clients are students, and they are completely dependent on the ease with which copyrighted information can be made available to them in reasonable proportions. In an information society, gentlemen, the quality of their education is in your hands. A list of our members is attached to this statement (Exhibit A). For the record, I would like to point out that we support the testimony given by the library associations this morning. These groups are members of the Ad Hoc Committee on Copyright Law Revision.

Our committee has appeared before you on previous occasions to outline our concerns in the critical matter of copyright law revision. These concerns included the need for a clear delineation of "fair use" so that teachers can know what is permissible and what is not permissible in the uses of materials to stimulate learning. We have still other concerns regarding the copyright legislation now before you. Because of time constraints, we have set forth those concerns in a footnote.[1] We will not, therefore, dwell on any of these matters today but instead will concentrate on the main thrust of this hearing—our proposal that a limited educational exemption be provided for teachers, scholars, and researchers to use materials for nonprofit purposes in carrying out their day-to-day work.

First, we would like to point out to the Subcommittee the rationale for this limited educational exemption. During the past eight years, the Ad Hoc Committee has made every effort to maintain contact and dialogue with publishers, authors, and materials producers to reach some type of accommodation which would take into account the interests of all parties concerned in the revision effort in order to strike a fair balance between the rights of proprietors and the rights of consumers/users of materials.

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[1] Other concerns of the Ad Hoc Committee: (a) the expansion of the duration of copyright from 28 year plus 28 years in the present law to life of the author plus 50 years in the proposed law (This we feel is unwarranted and will prevent materials from going into the public domain for at least 75 years and, in some cases, as much as 120 years.); (b) the liability of innocently infringing teachers and the excessive penalties which are possible under the proposed law; (c) the need for "fair use" to apply to instructional broadcasting and to instructional uses of computers and other technology; and (d) concerns as to the composition of the proposed commission on the technological uses of copyrighted works.

Our discussions, however, have been frustrated by the impact of the recent ruling by Commissioner Davis of the U.S. Court of Claims in favor of *Williams & Wilkins*, in its copyright infringement suit against the National Library of Medicine. Commissioner Davis' report, in our judgment, has great impact not only on library operations but also on the ability of the educational community to gain access to the intellectual resources of this nation. This ruling, if affirmed by the entire Court of Claims, would seriously limit the scope and meaning of "fair use." The Commissioner's ruling has caused considerable consternation and alarm within the educational community not only because of its effect on libraries but also because it would undercut the accepted and traditional meaning of "fair use" for teachers. The language and rationale are just as applicable against teachers and schools as against libraries.

Because the *Williams & Wilkins* decision proves the unreliability of "fair use" for schools and libraries, the Ad Hoc Committee urges Congress to adopt the concept of a limited educational exemption which would neutralize the harmful effect of the Commissioner's opinion on both schools and libraries and at the same time not be detrimental to publishers or producers of materials. In light of *Williams & Wilkins*, our request for a limited educational exemption is submitted to this committee not in lieu of "fair use" but in addition to "fair use" in the statutes. "Fair use" is generic in nature and is applicable to everyone—commercial and noncommercial user alike. Educational users need special protection over and above that provided commercial users because they have a public responsibility for teaching the children entrusted to them. They work for people—not for profit! They do not use materials for their own gain but for the benefit of the children of all of our citizens, including those of authors and publishers. This is the foundation stone for American education.

THE AD HOC COMMITTEE'S RECOMMENDATION

The Ad Hoc Committee on Copyright Law Revision therefore respectfully asks the Congress to include in its new copyright law the following operative wording of the limited educational exemption:

> "Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship or research is not an infringment of copyright."

The whole proposed language including definitions and limitations is attached to this statement. (See Exhibit B.)

In short, the Ad Hoc Committee's recommendations would enable teachers to make copies or recordings for purely noncommercial classroom teaching purposes of the following, for example:

A short poem.
A short story.
An essay.
A map.
An article from a magazine or newspaper.
Transparency of a chart from a newspaper or from a text for classroom use.
Transparency of a graph or diagram from a book, newspaper or a magazine.
A TV or radio program which is used within 5 school days after the recorder broadcast, then erased.
A rendition of a school orchestra for the purpose of self-evaluation.
A recording of a musical excerpt for the purposes of study.
Excerpts or quotations (such as excerpts from contemporary writings in a duplicated examination).

The Ad Hoc Committee is NOT asking for the right to copy an entire book or novel; a dictionary, reference book, musical score, encyclopedia, magazine, newspaper, pamphlet or monograph; a motion picture or a filmstrip. The Ad Hoc Committee is NOT asking the right to make copies of materials originally consumable upon use, such as workbook exercises, problems, answer sheets for standardized tests; nor is it asking for permission to anthologize.

In conclusion, we would like to point out that the doctrine of "fair use" alone is insufficient to provide the certainty that teachers and other nonprofit educational users of copyrighted materials need for their own protection particularly in light of recent developments in the *Williams & Wilkins* case. Teachers are not interested in mass copying that actually damages authors and publishers, but they need to be free to make creative use of all of the kinds of resources available to them in the classroom, and this necessarily involves some reproduction and distribution of copyrighted works such as contemporaneous material in the press, isolated poems and stories for illustrative purposes, TV or radio materials, and the like. Subjecting the use of modern teaching tools to requirements for advance clearance and payment of fees would inhibit use of teachers' imagination and ingenuity and necessarily restrict students' opportunity to learn. It is imperative, therefore, that a specific limited educational exemption for educational copying or reproduction be granted by the Congress.

In the event that this Subcommittee cannot grant our request, the Ad Hoc Committee will be unable to support the proposed legislation (S. 1361) unless it is changed in two major respects: (1) unless the bill specifically provides adherence to the concepts and meanings of "fair use" which were written into House Report No. 83, 90th Congress, as amended in the following respects:

(*a*) the elimination of the expression "no matter how minor" in reference to the fourth criterion

(*b*) the authorization for classroom purposes for limited multiple copying of short whole works, such as poems, articles, stories, and essays

(*c*) the application of the full impact of "fair use" to instructional television

and (2) unless the decision of the Commissioner in the *Williams & Wilkins* case is specifically rejected to the extent in which it differs from that House Report, as amended.

Accompanying me today are representative members of the Ad Hoc Committee who will speak to the Ad Hoc Committee's request for a limited educational exemption. The 41 organizations represented on the Ad Hoc Committee have thrashed out their differences, and the position we take now at this hearing best states the preponderant view of our Committee.

I turn now to the panel members. In the interest of time, I will ask each panel member to introduce himself to the Subcommittee and indicate the needs and concerns of the organization or organizations he represents relative to the Ad Hoc Committee's recommendation to the Congress.

EXHIBIT A

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION JULY 1973.

American Association for Higher Education
American Association of Colleges for Teacher Education
American Association of Junior Colleges
American Association of Law Libraries
American Association of School Administrators
American Association of School Librarians
American Association of University Women
American Council on Education
American Educational Theatre Association, Inc.
American Library Association
Association for Childhood Education International
Association for Computing Machinery
Association for Educational Communications and Technology
Association of Research Libraries
Baltimore County Schools
College English Association
Corporation for Public Broadcasting
Council on Library Resources
International Reading Association
Joint Council on Educational Telecommunications, Inc.
Medical Library Association
Modern Language Association
Music Educators National Conference
Music Teachers National Association
National Art Education Association
National Association of Educational Broadcasters
National Association of Elementary School Principals
National Association of Schools of Music
National Catholic Educational Association
National Catholic Welfare Conference

National Commission for Libraries and Information Science
National Contemporary Theatre Conference
National Council for the Social Studies
National Council of Teachers of English
National Council of Teachers of Mathematics
National Education Association of the United States
National Instructional Television Center
National Public Radio
National School Boards Association
Public Broadcasting Service
Speech Communication Association

INTERESTED OBSERVERS

American Association of University Professors
American Home Economics Association
American Personnel and Guidance Association
Associated Colleges of the Midwest
Association of American Law Schools
Association for Supervision and Curriculum Development
Federal Communications Commission
National Congress of Parents and Teachers

EXHIBIT B

Section . *Limitations on exclusive rights: Reproduction for teaching, scholarship and research*

Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship or research is not an infringement of copyright.

For purposes of this section,

(1) "use" shall mean reproduction, copying and recording; storage and retrieval by automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process;

(2) "portion" shall mean brief excerpts (which are not substantial in length in proportion to their source) from certain copyrighted works, except that it shall also include

(*a*) the whole of short literary, pictorial and graphic works

(*b*) entire works reproduced for storage in automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process, *provided* that

(i) a method of recording retrieval of the stored information is established at the time of reproduction for storage, and

(ii) the rules otherwise applicable under law to copyrighted works shall apply to information retrieved from such systems:

(*c*) recording and retransmission of broadcasts within five school days after the recorded broadcast; provided that such recording is immediately destroyed after such 5-day period and that such retransmission is limited to immediate viewing in schools and colleges.

Provided that "portion" shall not include works which are

(*a*) originally consumable upon use, such as workbook exercises, problems, or standardized tests and the answer sheets for such tests;

(*b*) used for the purpose of compilation within the provisions of Section 103(a).

Senator McCLELLAN. Who is the next witness to be heard from?

Mr. CARR. Mr. Chairman and members of the subcommittee, I am Alfred Carr, legislative consultant in the Office of Government Relations of the National Education Association.

I appreciate this opportunity to appear before you this morning on behalf of the National Education Association of the United States.

Teachers are both authors and consumers of educational materials, many of which are protected by copyright laws. NEA, representing some 1.4 million teachers and other educators, wants a law which will be equitable to both authors and consumers.

There is an overriding need to be met in the revision of the copyright law: the need to maintain openness in our society and to insure reasonable access to information and ideas for all of our citizens. This is of primary concern in our democracy.

The teacher gives visibility to the author's works and creates markets for them. One may ask: What good is an author's work if no one is interested in reading what he has written? In a sense, we promote the works of authors in the classroom. Teachers have the responsibility of stimulating interest on the part of learners. This means using a wide variety of materials and resources for teaching and learning. In the world of information in the 1970's, this imposes on the teacher a new responsibility to make rapid decisions regarding the use of materials—decisions which often turn out to be regarded as infringements or near infringements of the present archaic copyright law.

Teaching is no longer confined to the use of a single textbook. Creative teachers need bits and pieces of all sorts of written, pictorial, and graphic materials geared to the teachable moment when students are best ready to learn. Requiring a teacher to purchase a large book in order to use a small portion would simply mean that the teacher would neither buy the book nor use the materials. Teachers today must work in a world where the very atmosphere is loaded with information which students must learn to shift and evaluate.

What then are education's needs in any new copyright legislation passed by this Congress?

Immediate access to reasonable portions of printed and nonprinted materials for instructional purposes without payment of royalties. This reasonable access should be extended to the use of instructional television, computers, automated systems, and other developments in educational technology.

Certainty that the present law's "not-for-profit" principle be converted into a limited educational exemption for nonprofit uses of copyrighted materials.

Protection for teachers who innocently infringe the law in the performance of their duties as teachers.

Retention of the same copyright duration period as in present law: that is, 28 years plus a 28-year renewal period.

The teacher's needs encompass the new teaching-learning processes that are being stimulated by the enormous amount of new information and the attendant opportunities afforded by the new educational technology.

New teaching techniques—including the use of computers, closed circuit television, videotapes, recordings, and microfilm, among other forms of communications technology—have been developed to keep pace with the demands of the fast changing information explosion faced by our schools. They make possible more learning in less time. Flexible scheduling at the secondary level has been made possible by computers and has opened a wide choice for learners within the school day. Computerized scheduling can free students from rigid teaching patterns and enable them to be liberated for a portion of the day for individualized work, library activities, open laboratory work on a problem or project, or for individual conferences with teachers.

Schools without walls have opened the parameters of the learner to include attending political conventions, court hearings, sports events, and witnessing moon launches. Tools such as cassettes, videotapes, and cameras can be used to capture these events for sharing with other learners. All of this is to say that the world has changed considerably since 1909 and that this change can be seen in the schools as well as in every other sector of our society. The new copyright law must not freeze education at the 1930 level or even at the 1973 level.

It is important to cite a few teaching practices to illustrate the restrictiveness of S. 1361:

A teacher videotapes a relevant television program off the air for use on the following day with his or her social studies classes in the auditorium or in the classroom.

A teacher reproduces 30 copies of one page out of a copyrighted book.

A teacher puts a chapter from a copyrighted book into a computer in order to make an analysis of the grammatical structure.

A class is having difficulty understanding symbolism in literature, and the class text does not go far enough in its explanation. The teacher therefore makes multiple copies of a poem or a short essay—from another book—that would help the class understand the concept.

NEA strongly urges this committee and this Congress to adopt a revised copyright law that will explicitly provide limited exemptions for teaching, scholarship, or research purposes, and extend "fair use" provisions to new educational technology such as instructional television, computers, and automated systems.

Finally, therefore, we need a new law that will support, rather than thwart, good teaching practices in the 1970's.

Thank you.

Senator McCLELLAN. Thank you.

[The statement of Alfred Carr in full follows:]

STATEMENT OF ALFRED CARR, LEGISLATIVE CONSULTANT, NATIONAL EDUCATION ASSOCIATION

Mr. Chairman and members of the subcommittee, I am Alfred Carr, Legislative Consultant in the Office of Government Relations of the National Education Association. I appreciate this opportunity to appear before you this morning on behalf of the National Education Association of the United States.

Teachers are both authors and consumers of educational materials, many of which are protected by copyright laws. NEA, representing some 1.4 million teachers and other educators, wants a law which will be equitable to both authors and consumers. We wish to see proper protection of the interests of those persons whose creative abilities produce fine instructional materials. At the same time, we wish to insure that teachers and learners are protected in their creative use of materials in the classroom. There is an over-riding need to be met in the revision of the copyright law: the need to maintain openness in our society and to insure reasonable access to information and ideas for all of our citizens. This is of primary concern in our democracy.

The teacher gives visibility to the author's works and creates markets for them. One can ask: What good is an author's work if no one is interested in reading what he has written? In a sense, we promote the works of authors in the classroom. Teachers have the responsibility of stimulating interest on the part of learners. This means using a wide variety of materials and resources for teaching and learning. In the world of information in the 1970s, this imposes on the teacher a new responsibility to make rapid decisions regarding the use of materials—decisions which often turn out to be regarded as infringements or near-infringements of the present archaic copyright law.

Teaching is no longer confined to the use of a single textbook. Creative teachers need bits and pieces of all sorts of written, pictorial, and graphic materials geared to "the teachable moment" when students are best ready to learn. Requiring a teacher to purchase a large book in order to use a small portion would simply mean that the teacher would neither buy the book nor use the materials. Teachers today must work in a world where the very atmosphere is loaded with information which students must learn to sift and evaluate.

What then are education's needs in any new copyright legislation passed by this Congress?

Immediate access to reasonable portions of printed and non-printed materials for instructional purposes without payment of royalties. This reasonable access should be extended to the use of instructional television, computers, automated systems, and other developments in educational technology.

Certainly that the present law's "not-for-profit" principle be converted into a limited educational exemption for non-profit uses of copyrighted materials.

Protection for teachers who innocently infringe the law in the performance of their duties as teachers.

Retention of the same copyright duration period as in present law; i.e., 28 years plus a 28-year renewal period.

The teacher's needs encompass the new teaching-learning processes that are being stimulated by the enormous amount of new information and the attendant opportunities afforded by the new educational technology.

New teaching techniques—including the use of computers, closed-circuit television, videotapes, recordings and microfilm, among other forms of communications technology—have been developed to keep pace with the demands of the fast changing information explosion faced by our schools. They make possible more learning in less time. Flexible scheduling at the secondary level has been made possible by computers and has opened a wide choice for learners within the school day. Computerized scheduling can free students from rigid teaching patterns and enable them to be liberated for a portion of the day for individualized work, library activities, open laboratory work on a problem or project, or for individual conferences with teachers.

Schools without walls have opened the parameters of the learner to include attending political conventions, court hearings, sports events, and witnessing moon launches. Tools such as cassettes, videotapes, and cameras can be used to capture these events for sharing with other learners. All of this is to say that the world has changed considerably since 1909 and that this change can be seen in the schools as well as in every other sector of our society. The new copyright law must not freeze education at the 1930 level or even at the 1973 level!

It is important to cite a few teaching practices to illustrate the restrictiveness of S. 1361:

A teacher videotapes a relevant television program off the air for use on the following day with his or her social studies classes in the auditorium or in the classroom.

A teacher reproduces 30 copies of one page out of a copyrighted book.

A teacher puts a chapter from a copyrighted book into a computer in order to make an analysis of the grammatical structure.

A class is having difficulty understanding symbolism in literature, and the class text does not go far enough in its explanation. The teacher therefore makes multiple copies of a poem or a short essay (from another book) that would help the class understand the concept.

All of these practices, according to counsel for some publishers, would constitute infringements under the present law. Likewise, they would be considered infringements under the proposed bill, S. 1361, which is not significantly different from the present law. This again illustrates that the 1909 law is out of joint with present practices in the schools of the '70s.

In our judgment, the proposed copyright law would drastically curtail the use by teachers of various materials for instruction. NEA strongly urges this Committee and this Congress to adopt a revised copyright law that will explicitly provide limited exemptions for teaching, scholarship, or research purposes, and extend "fair use" provisions to new educational technology such as instructional television, computers, and automated systems.

Finally, therefore, we need a new law that will support, rather than thwart, good teaching practices in the 1970s.

Thank you.

Senator McClellan. Who is next?

Mr. Hogan. My name is Robert F. Hogan, and I am the executive secretary of the National Council of Teachers of English.

I will depart considerably from my written statement, which was submitted, and I would be glad if that would go into the record, too.

One of the remarkable effects of 10 years of discussion and debate over the needed provisions in a new copyright law is that it has cast into an adversary relationship persons who are not only friends but interdependent professional colleagues—teachers, writers, and publishers.

Many writers teach. Some of us who teach write and hope to publish. Most of the editorial staff members of educational publishers began as teachers. Some still teach.

The unnaturalness of this adversary relationship is revealed again and again by the recurrence of the same refrain in our private and off-the-record conversations: "But I didn't mean that."

I cite a practice of a brilliant, creative teacher—a practice which would be prohibited by a restrictive copyright law; and my publisher friend says, "But I didn't mean that."

He, in turn, cites an instance of district-wide wholesale piracy; and I say, "But I didn't mean that."

In my prepared statement I've tried to make clear by example on page 2 what NCTE does mean and on page 3 what it does not mean. If I may depart from my informal remarks, I would direct your attention to the bottom of page 2 of my prepared statement: The question of the moment is not whether or not Mr. Housman or his estate will forfeit income. Rather, the question is whether or not as a teacher I am free to use Mr. Housman's poem in this way; or whether, encumbered by a restrictive law, I must plod ahead with whatever I had planned for that day—for example, the third part of the rhyme of The Ancient Mariner—before I knew what that day meant for my students.

Briefly, we join the other members of the Ad Hoc Committee in seeking a limited educational exemption within the guidelines set forth by Mr. Wigren. Until the Williams and Wilkins case, we had thought the doctrine of "fair use" could be made to offer sufficient protection for the creative teacher. Mr. Wigren has made clear why we no longer believe that.

I concluded my prepared statement with the following paragraph:

> The best teachers at any level are bright, creative individuals who not only know their subject and understand how children learn, but who connect what they teach to the world around their students. They not only serve their own students well, but by their example they inspire less gifted colleagues to teach better than they otherwise might. What the National Council fears most of all in a restrictive copyright law is that penalty and the fear of penalty will stifle creativity and imagination among teachers and reward pedestrian teaching.

To put it another way, we hope for a law that will offer the creative teacher more security than the uncertain feeling that "they won't sue me because, surely, they didn't mean that."

What we hope is that after the law is finally written and its accompanying report is issued, and the first piece of litigation is instituted and brought to its conclusion, no one—teacher, publisher, author, or legislator—will look at that conclusion and say in a private and off-the-record moment:

"But I didn't mean that."

Thank you.

Senator McClellan. Thank you.

[The statement of Robert F. Hogan in full follows:]

STATEMENT OF ROBERT F. HOGAN, NATIONAL COUNCIL OF TEACHERS OF ENGLISH

Mr. Chairman and members of the subcommittee, I am Robert F. Hogan, Executive Secretary of the National Council of Teachers of English. The National Council is the world's largest independent organization for teachers of one subject. Its 115 thousand individual, associate, and institutional members and subscribers are drawn from all levels of education, elementary through graduate school. For them, I express our appreciation for this opportunity to submit written and oral testimony to the subcommittee.

Although a substantial majority of this membership consists of classroom teachers, it also includes authors, editors, and publishers. The Council itself is a publisher of seven periodicals and about fifteen books and monographs each year, all protected by copyright. I stress those two facts, on the chance that someone might construe the remarks that follow as threatening to the interests of authors, publishers, and others who have a genuine stake in reasonable protection through copyright. The Council shares that stake.

What chiefly concerns us is, while ensuring the maintenance of reasonable copyright protection, to recognize fully the needs of more than a million elementary classroom teachers who spend up to half their teaching time and effort on language arts and reading, 175 thousand secondary school teachers of English, and, most of all, the 45 million children they teach.

The Council has supported and participated in the work of the Ad Hoc Committee on Copyright Revision for more than a decade. Until last year the Council felt reasonably confident that "fair use," as provided for in House Report No. 83 of the 90th Congress and as amended in the testimony of Mr. Wigren, Chairman of the Ad Hoc Committee, would afford adequate protection for teachers and fair treatment to copyright proprietors. However, the outcome of the *Williams & Wilkins* case has destroyed that confidence. The recommendations to the U.S. Court of Claims from the Commissioner of that Court could have no other effect. They call into question not only the right of the teacher or a scholar to make by photocopy or machine one copy of a copyrighted work, but even to hand-copy such material. In the light of this restrictive interpretation of "fair use," the National Council joins other members of the Ad Hoc Committee in seeking a limited educational exemption to shore up, in the law, the protection we need.

What kind of privilege is it that we seek? Perhaps some examples would help to make that clear:

(1) In the course of a unit on satire, to make multiple copies of a newspaper column by, say, Art Buchwald or Mike Royko to illustrate contemporary satire:

(2) To select from the students' textbooks a poem they have not been taught and to make multiple copies for use in an examination:

(3) To make multiple copies of book reviews from a variety of sources—*New York Review, Ms., Esquire, Time*—to show how different reviewers deal with the same book: and

(4) To take into account a sudden issue of widespread interest—for example, the murder of the athletes at the Berlin Olympics—by making for students that following day copies of Housman's poem "To An Athlete Dying Young."

Let me be just as specific in citing privileges the Council does *not* seek:

(1) To substitute for commercial anthologies, collections of copyrighted literature manufactured locally:

(2) To copy consumable materials such as answer sheets for commercially published tests, the tests themselves, or workbooks: and

(3) To store indefinitely and reuse periodically stencils or other "master copies" of materials once duplicated for spontaneous use in a particular teaching situation.

The best teachers at any level are bright creative individuals who not only know their subject and understand how children learn, but who connect what they teach to the world around their students. They not only serve their own students well, but by their example they inspire less gifted colleagues to teach better than they otherwise might. What the National Council fears most of all in a restrictive copyright law is that penalty and the fear of penalty will stifle creativity and imagination among teachers and reward pedestrian teaching.

Senator MCCLELLAN. Next?

Mr. SCHOECK. Mr. Chairman and members of the subcommittee, I am Richard J. Schoeck, director of research activities of the Folger

Shakespeare Library in Washington. I appear before you today representing the Modern Language Association of America, which has a membership now of 30,000, all of whom are teachers, and most of them scholars, active in research.

The MLA supports the statement of Mr. Wigren, which you have just heard, and I am here to endorse an educational exemption.

I want to speak in support of this exemption and to touch on what was put more fully in my written statement.

Speaking now for the MLA in particular, I stress the need for a clear delineation of what is permissible in the uses of material for teaching, for research, and for scholarly writing—but this is minimal. Until the *Williams & Wilkins* case, we were, for want of something better, satisfied with the doctrine of fair use, but that doctrine has been substantially altered by the *Williams & Wilkins* case. The entire copyright status quo has inevitably been changed since last year. Now the appeal of Williams & Wilkins is in progress and, while we trust that the appeal will render justice in that individual case, it may not clarify the concept of fair use, especially insofar as educational aspects are concerned.

The *Williams & Wilkins* case was largely a case concerned with the interests of a commercial publisher, and this point points to the other difficulties or limitations of the fair use doctrine. The precedents for fair use are virtually all concerned with commercial interests with one publisher against another publisher. This is a hostile environment for the needs and ends of teaching and scholarship because scholarship is not competitive, even though the getting of an academic job may be. An educational exemption would be a welcome relief in the field of copyright and would put the needs of teaching and research in a wholly new context—new in the United States, though not elsewhere.

A scholar has always been considered to have the right to make a single handwritten copy of copyrighted material for his own personal use, and this practice has always been contained in research libraries where I have worked in the United States, Canada, the United Kingdom, and Europe, yet this basic and traditional right is seriously questioned by Commissioner Davis.

Now, there are alternatives to the limited educational exemption, and I tried to consider those briefly in my written statement. These, however, would be second best to the exemption for which we are asking and they are only a defense in the event of a lawsuit. They would also put the burden of proof on the teacher or scholar.

An operative wording of the limited educational exemption has been put forward by Harold Wigren. It does not go far as giving the right to copy an entire book, but only a short poem or story or essay or article or to use excerpts or quotations in classroom teaching.

To indicate that I tried to see the whole spectrum of interests and concerns in this copyright problem, may I say that I speak under several hats: as the editor of a scholarly journal frequently called upon to give permission to reprint from its publishers; as the director of publications in the Folger Shakespeare Library, in which capacity I am richly aware of costs in publishing; as an author, editor, or coeditor myself, with more than a dozen books and more than 100 scholarly papers and articles; as a professor of years of experience in a number of universities; as a member of the staff of a research laboratory: and finally, as the representative of the 30,000 members of the MLA.

This request for a limited educational exemption seems to satisfy a wide spectrum of interests and appears to be reasonable, equitable, and necessary for sound teaching and research as well as for the continuance of a healthy intellectual life in this country.

Thank you.

Senator McCLELLAN. Do you think that such a position favoring educational uses as that suggested in your proposed amendment would not have a serious impact on the ability of the sources to provide this material and continue publication?

Mr. SCHOECK. A point that is touched on in the Government's presentation in Williams and Wilkins is that a great deal of the cost of preparation does come, especially in scientific journals, from the Government. In the humanities, some of these funds are obtained from foundations and from universities.

Senator McCLELLAN. In that connection, may I ask you if you think it would require an increased subsidy from the Government to support it?

Mr. SCHOECK. Well, that is already underway, I understand, Mr. Chairman.

Senator McCLELLAN. I know, but the time is coming when this Government can't subsidize everything. That source is going to dry up, too.

Mr. SCHOECK. Well——

Senator McCLELLAN. I would be very happy just to say well, we will just give you more subsidy from the Government for these things.

Mr. SCHOECK. A great deal of the cost of producing scholarship is borne by the individual scholar himself. I would suppose 25 percent of my scholarly costs have been paid by a foundation or the Government. The rest I pay myself—and I think this is true of most scholars.

Senator McCLELLAN. Well, I am not talking about your situation, though, I am talking about the ability to continue publishing.

Now, I am not taking up for anyone here. I am trying not to. In fact, I don't know which side I am on, actually, but you have this benefit to the educational community and to have these facts disseminated in these publications and so forth, well, they have to be created, they have to have an author to create them, and somebody to publish them first. That involves some costs, and when that cost can't be recovered, we are going to dry up the source.

Mr. WIGREN. Senator, may I break in?

Senator McCLELLAN. Yes, I would just like to make this record as full as we can.

Mr. WIGREN. I have before me a news release from the Educational Media Producers Council, Fairfax, Va., dated May 16, 1973, and the heading reads "Demand for Educational Audiovisual Materials Rises 10.8 Percent in 1973." And the article's first paragraph reads:

> Greater use of audiovisual materials continued to characterize the classroom in 1972, according to a report to be released May 31 by the Educational Media Producers Council. The EMPC Annual Survey and Analyses of Educational Media Producers' sales shows that total sales of non-textbook instructional materials rose to 214.7 [million] in 1972, an increase of 10.8 percent over 1971. The survey, conducted by an independent market research firm under the auspices of the Educational Media Producers Council, presents a comprehensive picture of total

industry software volume, are a wide range of statistical data and analyses of the education market.

Now, I read this to point out that I don't really think that the industry is bleeding in this regard because of a few uses which we make of materials in the classroom, particularly not if the sales rose 10.8 percent in the audiovisual field alone. Now, I don't have with me the data on the textbook publishing industry, but I would be surprised if they were substantially different. May I point out that these record sales were achieved despite the fact that teachers were making limited copies of excerpts of many of these materials.

Senator McClellan. What I want to do is ascertain what impact this amendment would have, if any, on the financial stability of the publishers and other interests.

Mr. Rosenfield. Mr. Chairman, if I may supplement what Mr. Wigren has said?

In 1973—May 1973—Fortune went into its customary 500 largest industries, and indicated that the publication industry and the related industries have had at least as high, if not higher, an average increase in profits, as many of the others involved in the top 500. And this is despite the fact, if not because of the fact, that teachers are making very limited copies because, in our judgment, this helps the sale of materials and not hinders.

Senator McClellan. Well, I wonder if the publishers would agree with your analysis of their prosperity?

Mr. Rosenfield. Well, at least the facts in both cases, these are independent assessments. The one that Dr. Wigren mentioned was the producer group itself and the one that I mentioned, is an independent business group over which we, as school people, have absolutely no influence.

Senator McClellan. Thank you. Proceed.

Mr. Schoeck. Well! I finished the formal part of my presentation, although I had perhaps not fully answered your questions.

There is, perhaps, the final publication of scholarships which I think ought to be distinguished from textbooks and educational publication. There is no question but that the publication of scholarly journals and the publication of scholarly monographs are in a precarious position during the last period because of skyrocketing costs, and that is a very serious matter. Now, I do not consider the limited educational exemption that the MLA is supporting as part of the ad hoc committee, as a serious threat to scholarly publication.

Senator McClellan. That is the point. I think it is valid and important to ascertain what the impact of this is, this educational exemption for educational purposes, what impact, if any, that will have upon the ability of the sources, the present sources, to continue to make such material available. If it is serious, it ought to be weighed. If it is trivial, it can be ignored.

Mr. Schoeck. It is perhaps relevant to point out that in getting necessary permission to reprint, whether for scholarly books or in a scholarly journal, very often presses have asked what seemed to me to be exhorbitant rates for that permission to reprint and at times the rates have been so high that the editorial or scholarly judgment has had to be subordinated to the practical considerations because we could not afford those permission fees that were demanded.

Senator McClellan. Quite possibly the people who make such demands do themselves more injury than anyone else. I don't know.

But they own it, and they have a right to put a price on it, I assume. But I think that must be an exception and not the rule. I think most of it would be made available at reasonable prices, wouldn't it?

Mr. **Schoeck.** Well, as a general editor of a series of books, published by the University of Chicago presently, I know that it is not uncommon for a press to ask for a $200 or $300 or often a $500 fee for reprinting a single chapter or essay which is in some cases an essay which may have appeared in half a dozen places before.

[The statement of Richard J. Schoeck in full follows:]

STATEMENT OF RICHARD J. SCHOECK

Mr. Chairman and members of the subcommittee, I am Richard J. Shoeck, a member of the Ad Hoc Committee on Copyright Law Revision. I am Director of Research Activities of the Folger Shakespeare Library in Washington, and Director of the Folger Institute of Renaissance and 18th-century Studies. I am also an Adjunct Professor of English in the University of Maryland and the editor of *Shakespeare Quarterly.* I appear before you today representing the Modern Language Association of America, which has a membership of 30,000, all of whom are teachers, most of whom are doing research and some of whom are writing (or have written) textbooks and other educational materials during their careers as college and university professors. Our point of view is therefore rather more complex than that of some groups that have a concern with copyright law revision, for the MLA must consider not only the problems of research and copyright, or of the writing of books and copyright, but also the impact of copyright upon teaching. We have always had to consider the interests of our students. The MLA therefore has long been a member of the Ad Hoc Committee, and it participated in the *amicus* brief of the Association of American Law Schools in *Williams and Wilkins* case. It now participates in and supports the statement of the chairman of the Ad Hoc Committee, Harold E. Wigren, on S. 1361.

Speaking for the MLA, I should stress the need for a clear delineation of what is permissible and what is not permissible in the uses of materials in the classrooms, in the uses of materials for research, and in the uses of materials for scholarly and textbook writing.

The report of Commissioner Davis in *Williams & Wilkins* (1972) must be seen as a landmark, for until that report there had been a fairly well understood and observed set of criteria under the unmbrella of 'fair use.' Now there is not, and a great deal of alarm and confusion has been produced within the educational community, because the effect of the Commissioner's report in *Williams & Wilkins* is to restrict the accessibility of intellectual resources to both teacher and scholar.

A scholar has always been considered to have a right to make a single copy of copyrighted material for his own personal use: this must be so to insure a free circulation of ideas, and this surely is the thrust of Article I, § 8 of the Constitution of the United States: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries." The exclusive right is for limited times only: the end for which the other provisions of Article I are the means is the promotion of science and the arts, and such promotion cannot be fostered without the free circulation of ideas. The provisions of Title 17 of the U.S. Code are largely concerned with the printing or reprinting or publishing of the copyrighted work: *copy* as used in this section is to be construed as pertaining to copying in the same sense as printing or publishing. Scholarship that is restricted by newly erected walls of copyright protection would become parochial—and it would not take long for the effects of such constriction to be evident in the thinking of our children.

A scholar's copying of material has been traditional in the Western world since far before the time of Erasmus, and it continues to our own times. Even that prophet of the electronic age, Marshall McLuhan, has made or has had made handwritten or typewritten copies of entire works: I have one such copy in my possession. But even that traditional and never previously challenged right of scholars was questioned by Commissioner Davis, and because the courts had not previously had the occasion to spell out the legal basis for the traditional right of scholars to make (or to have made) a single copy of copyrighted material for personal use, the fundamental procedures of scholarship are now being gravely challenged, and the very quality of scholarship in the U.S. is consequently threatened.

If the ruling of Commissioner Davis in *Williams & Wilkins* is affirmed by the Court of Claims, the scope and meaning of 'fair use' will in effect have been abrogated. The force of application of the Commissioner's ruling will be to the detriment of libraries—and especially to research libraries like the Folger, as you will have heard this morning—but also to the detriment of teaching and scholarship. Had this hearing been held before March of 1972, many of us who have testified would have spoken differently. But it is impossible now to talk about educational and research uses of copyrighted materials as if we were in a pre-Williams and Wilkins world: we are not.

Two alternatives appear to be open: the new legislation on copyright can specifically affirm 'fair use,' and this might be done by having the concepts, traditional interpretations, and effective application of 'fair use' written into the Congressional Report, as indicated by Dr. Wigren. Or, the Congress may (and as we believe, should) include in its new copyright law the so-called limited educational exemption: Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright.

As the editor of a scholarly journal frequently called upon to give permission to reprint from its pages—as an author, editor or co-editor of about a dozen books and more than a hundred scholarly papers and articles—as a professor of more than twenty years of teaching experience in several universities (Cornell, Notre Dame, Toronto, Princeton, and now Maryland)—and finally as a representative of the 30,000 members of the MLA, this requested limited educational exemption seems to me reasonable and equitable, and, still more, necessary for sound teaching and research and for the continuance of a healthy intellectual life in this country.

Senator McClellan. Who is next?

Mr. Norwood. Mr. Chairman, and members of the subcommittee, I am Frank Norwood, executive secretary of the Joint Committee on Educational Telecommunications, which is a consortium of national and regional nonprofit organizations and associations including most of the major national entities in instructional broadcasting. What I shall attempt to do this afternoon is to summarize the principal concerns regarding copyright revisions and instructional broadcasting as they have been expressed by those members of the ad hoc committee who are most directly concerned.

I want to state we fully support, as do my colleagues here, Dr. Wigren's testimony, and I want to paraphrase my written submission, but I still hope to touch on the four points which are before us:

First, we want to stress the need to make clear that both the doctrine of fair use and the proposed limited educational exemption applied to instructional radio and television the same way that they apply to other forms of teaching;

Second, that beyond "fair use," instructional broadcasting stands ready to pay reasonable and just fees for the use of copyrighted materials, but there is a need to assure prompt access to such materials under standard terms and conditions;

The third point that I want to take a moment to discuss is that statutory limits on the number of copies or span of use of instructional programs could have the effect of precluding the development of materials of highest quality for widespread use;

And finally, I want to talk briefly about the fact that teachers should not be prohibited by legislation from the delayed use in the classroom of broadcast programs so long as—and I think this is the point, Mr. Chairman, that you expressed interest in—so long as in doing so the threat of adverse impact on the later market for commercially available films or tapes of the same program is removed.

If I may, I would like to go back and pick up each one of those. Let me begin by saying when we talk about instructional broadcasting, we are using a term which is much more narrow in its definition than educational broadcasting or public broadcasting. By instructional broadcasting, we mean those transmissions which are a regular part of the systematic teaching activities of a government body or nonprofit educational institution. We are suggesting that, just as the teacher brings to the classroom a cartoon or a map from the morning's newspaper to illustrate her point, so too she should be allowed to do that if she addresses her class through the medium of television. And basically our concern stems from wording within House Report 83 which would appear to indicate that the doctrine of fair use is somehow different when applied to educational broadcasting.

Insofar as narrowly defined instructional broadcasting is concerned, it is our contention that there should be no difference than the needs or rights of the teacher in the classroom without such broadcasting, or the same teacher when she uses television to reach her students.

Having said that, let me be quick to add that we are not arguing that all instructional television should be free to use copyrighted material under any circumstances at any time. Clearly there are instances in which the producers of instructional programs should be and indeed are willing to pay copyright fees which are reasonable and just. But that has its corrollary, we suggest, and that is that they should have access to those materials.

Just as my colleague has mentioned the problems dealing with publication and using materials that are reprinted elsewhere, the instructional television producer has a very large and complicated set of problems in gathering material to use in the television broadcasting area. The problem is not his unwillingness to pay, but the lengthy negotiations and the complex administration that is required. And so we suggest that in order to do this in an atmosphere in which the clerical costs are not, perhaps, greater than the costs of acquiring the rights to use copyrighted material, and in which the producer does not have to labor under the uncertainty of not knowing what material he will be able to acquire the waiting for letters which, perhaps, are never answered, and so on—that some form of standardized procedures and protocols be developed which would allow some certainty in this, and which will provide opportunities for the broadcaster and the copyright holder to have dealings which are prompt, simple, honest, and fair to both sides. We think that is a necessity.

The third point has to do with the proposed limitations on the number of videotapes which may be made. Instructional television has been something of a cottage industry during most of its life with the institutions involved doing their own programs locally. In order to produce programing of higher quality than is within the resources of any single institution, now more agencies are coming together—television stations, State departments of education, large school systems, and so on—to pool their resources and jointly to produce material of much better quality and much more educational value than they could produce by themselves. Then to put a limitation on how many copies may be produced or how long the copies may be used, essentially deprives these people of the opportunity to recoup their substantial investments that high quality materials require.

Finally, and perhaps of most widespread interest to the teacher in the classroom, I would like to talk about a practice which is in question, but which there is substantial and growing interest, and that is the ability of the classroom teacher to use modern technology, particularly videotape recording, in order to bring into the classroom a television program as she might bring in a map or the picture from the newspaper that I spoke of earlier. Here we are aware of the fact that without some safeguards, such off-the-air recordings might represent a threat to the producers and to possible later sales. So we propose, as Dr. Wigren in his statement indicated, this be done within certain narrowly confined restraints which would mean that the recording should be made and used within a 5-day period; its basic purpose being simply to bridge that gap between the time when the program is on the air and the time when the class meets. After the 5 days, the record should be erased. Thus, for a library copy, or for copies for use in subsequent semesters, the commercial market, which makes them available usually months after the program has been on the air, would still be the teachers' source for those later uses.

In summary, let me say again that as an alternate form of teaching, instructional broadcasting requires equitable treatment under the doctrine of fair use and educational exemption. Beyond that point, beyond those doctrines, producers of instructional programing are willing to pay reasonable copyright fees, but the producer cannot do so unless the producer has access to copyright materials under a system of terms and conditions which frees him from the present pattern of delays, high administrative costs and uncertainty. In order to achieve critical mass and needed economies of scale, instructional broadcasting must be free from arbitrary limitations upon the number of recordings that can be made and on their useful lifetime. Finally, there is a growing interest in using educational technology to bring into the classroom important programs which can contribute significantly to the instructional process which would not otherwise be available on a timely basis.

Senator McClellan. Thank you, sir.

[The statement of Frank W. Norwood in full follows:]

STATEMENT OF FRANK W. NORWOOD, EXECUTIVE SECRETARY, JOINT COUNCIL ON EDUCATIONAL TELECOMMUNICATIONS

Mr. Chairman and members of the subcommittee, I am Frank Norwood, Executive Secretary of the Joint Council on Educational Telecommunications, a consortium of national and regional non-profit organizations and associations including most of the major national entities in instructional broadcasting. What I shall attempt to do this afternoon is to summarize the principal concerns regarding copyright revision and instructional broadcasting as they have been expressed by those members of the Ad Hoc Committee who are most directly concerned.

I shall touch upon four points:

The need to make clear that "fair use" and limited educational exemption apply to instructional radio and television as they apply to other forms of teaching;

That beyond "fair use," instructional broadcasting stands ready to pay just fees for the use of copyrighted materials but there is a need to assure prompt access to such materials under standard terms and conditions;

That inappropriate limits on the number of copies of span of use of instructional programs could preclude the development of materials of highest quality for widespread use; and

That teachers should not be prohibited from the delayed use in the classroom of broadcast programs so long as the threat of adverse impact on the later market for commercially-available films or tapes of the same program is removed.

"Instructional broadcasting" is a term much narrower and more precise than "educational broadcasting" or "public broadcasting." By instructional broadcasting we mean a broadcast transmission which is a regular part of the systematic teaching activities of a governmental body of non-profit educational institution. Under such a precise definition it is clear that the teacher who lectures from the television studio is no different than the teacher in the classroom and that his need to "use a portion of copyrighted work for noncommercial teaching" is precisely the same. Basically, our concern stems from wording within House Report 83 which would appear to indicate that the doctrine of fair use is somehow different when applied to educational broadcasting. Insofar as *instructional* broadcasting concerned we hold that no differentiation should be made between the needs and rights of the teacher in the classroom and the same teacher when she reaches a number of classrooms via radio or television.

Having said that, let me be quick to add that we do not hold that all uses of copyrighted materials in instructional broadcasting should automatically be covered by fair use or educational exemption. Clearly there are many instances in which the producers of instructional programs should be—and, indeed, are willing to pay copyright fees which are reasonable and just. The willingness of instructional program producers to pay for the materials they use has its necessary corollary: that instructional broadcasters must have access to the materials for which they are willing to pay—access without undue delay, without staggering administrative burden and expense, and without the uncertainty which now prevails when requests for permission to use materials go unanswered. What instructional broadcasting seeks as relief from these problems is not complete freedom from copyright liability above and beyond their use and the limited educational exemption sought by the Ad Hoc Committee but some standard set of procedures and protocols under which the instructional broadcaster and copyright holder can have dealings which are prompt, simple, honest, and fair to both sides.

Solution to this problem can do much to provide a climate in which well-produced, educationally sound, instructional programs can flourish. All of our experience testifies to the fact that instructional programming of the highest quality—particularly in television—requires substantial resources. Rather than rely on what their own limited resources can provide, school systems, statewide agencies and noncommercial broadcasters are coming together to form consortia to finance instructional series for their own use and for sharing with other educational groups. In order to achieve consortium financing and to recoup the substantial investments which are required for program series which are professionally produced under the guidance of educational experts in content and methodology, the programs must be available for widespread and prolonged use. Because instructional broadcasting—and particularly instructional television—is at last emerging from the cottage industry stage, we suggest that statutory limits upon the number of tape copies which may be made, or their useful life, are counterproductive. Further, since those in instructional broadcasting are willing to pay for the use of copyrighted materials to which they can have simple access, such restrictions are wholly inappropriate.

Finally, I want to speak about the retransmission of radio and television programs, particulary about the use of recordings made off-the-air for classroom use. Programs which may be of great instructional value do not—unfortunately—always appear on the broadcast schedule at the precise time when teacher and class meet. The advent of simple and inexpensive video tape recorders has made it possible to bridge that gap, and teachers are increasingly interested in recording programs for use when next their class meets. We believe that such a practice is sound and that it should be permitted under limited educational exemption within certain clear and narrowly-defined limits: that the user should make but a single copy for use within his educational institution and not for showing to a general audience. Further, such recordings should be made and used within a five-day period, and that after five days the recording should be erased.

The purpose is to bridge the short but critical gap between broadcast and class meeting. Such recordings should not—and under these restrictions, could not—substitue for film or videotape versions which only become available through commercial sources months or years after the time of broadcast. By limiting to five days the life of such recordings as we propose here, immediate educational needs could be served without adverse effect upon the later commercial market for library copies or copies for classroom use in subsequent semesters.

In summary, as an alternate form of teaching, instructional broadcasting requires equitable treatment under the doctrines of fair use and educational exemption. Beyond these doctrines, producers of instructional programming are willing to pay reasonable copyright fees, but they cannot do so unless they have access to copyrighted materials under a system of terms and conditions which frees them from the present pattern of delays, high administrative costs and uncertainties. In order to achieve critical mass and needed economies of scale, instructional broadcasting must be free from arbitrary limitations upon the number of recordings which can be made, and their useful lifetime. Finally, there is a growing interest in using educational technology to bring into the classroom important programs which can contribute significantly to the instructional process which could not otherwise be available on a timely basis.

Thank you.

Senator McClellan. Next?

Mr. Stedman. Mr. Chairman and members of the subcommittee, I am John Stedman, professor of law, the University of Wisconsin. I am a member of the Special Committee on Copyright Law of the Association of American Law Schools. Representatives of the American Association of University Professors and the American Council on Education have joined in the deliberations of that committee. I appear before you today at their request.

As you can gather from the associations involved here, our concern is primarily directed to university and college education and scholarship. In accordance with the procedures that have been set down, I will forego reading my prepared statement, which has been submitted to you, and simply attempt to state the highlights of it.

Senator McClellan. All right. Your statement will be printed in the record.

Mr. Stedman. Our basic recommendation is this: We urge enactment of a statutory fair use provision accompanied by supportive language in the committee report comparable to that contained in House Report 2237 expressing its concept of fair use as that term was understood prior to *William and Wilkins*.

This is an important but a modest recommendation. It merely suggests after all that your committee stand by the approach that the House took in 1967 when it passed an earlier version of the copyright revision bill and the approach your committee takes at the present time as evidenced by the language of section 107.

The reasons behind our recommendations here are threefold: one, flexibility in usage is essential to teaching scholars; two, the "fair use" doctrine, properly understood and properly applied with respect to education, will provide this flexibility and do so without economic injury to the copyright owner; three, in the light of how the legal process works and some recent legal developments, it is essential that this doctrine, which has heretofore been a purely judicial doctrine, be expressly written into the copyright statute accompanied by supporting language in the committee report.

Let me take these three propositions in order.

(1) With respect to flexibility, effective teaching and scholarship are crucially important to our society and becoming more so every day.

And the higher education community has been given a major responsibility for advancements in this area. I don't believe I need to belabor this point any further. These advancements cannot be accomplished without some flexibility in the use of copyrighted material. This is absolutely essential to effective teaching and scholarship.

In his role as a researcher, the educator must have the ready access to excerpts, articles, and hard-to-get materials. Here, single copy duplication of excerpts and inter-library lending are the only feasible solutions. In his role as a teacher, the educator must have access to excerpts, typically of current articles, and he must have these available for students if an adequate job of teacher-student communication is to be carried out. Duplication for such temporary usage is the only answer.

(2) Now, let me turn to the role of fair use in this. It is essential that these materials, in their limited form and scope and for their limited temporary and nonprofit use, be made available promptly and without cost to the users. Otherwise they will simply not be used. The copyright owner will gain nothing but education will suffer severely, and in the case of higher education, at least in most instances, the author as well will suffer. This is where the fair use doctrine comes in. In its basic concept, it is a sort of safety valve designed to permit usage of copyrighted materials and the information contained in these materials, in circumstances where a public interest in such usage will be served and where that public interest would be frustrated if one were denied freedom to see it, and where allowing such usage will occasion little or no economic injury to the copyright owner in comparison to the public advantage that will accrue. This is exactly the case in the situation we are talking about here.

In future educational activities fair usage can and should play an important role.

(3) Finally, let me address myself to the reasons for legislation on the subject of fair use. The factors that make it important to write this doctrine into the statute and accompany it with a clear statement of legislative intent are, I think, fairly clear. The courts, as we know, are heavily influenced by precedent, and there has in the past been virtually no precedent with respect to educational usage presumably because such usage has not been controversial or challenged.

Now it is a matter of controversy and it has been seriously challenged as a result of the sweeping language and reasoning contained in the preliminary decision in the *Williams and Wilkins* case. Under these circumstances it becomes crucially important that Congress speak out and provide the courts with guidance in this matter.

And so we conclude as we began with a request that this committee continue the traditional recognition of fair use in the research and teaching context by the enactment of section 107 coupled with supportive legislative history as outlined in our prepared statement.

I should add one minor point. There are two clarifications that should be made in the existing language of section 107 of S. 1361 which we think should be made explicit. We would like to see the legislative history indicate that none of the other sections of the act limit the force of section 107. This is already written into some of the provisions. It is clearly stated several times in the House report. We want to see that in this report as well.

We would also like the history to show that the fair use doctrine protects the maker of a copy as fully as it protects the user of that copy.

Thank you very much.

Mr. BRENNAN. Mr. Chairman, for the benefit of the committee, 4 minutes remain to the committee.

[The statement of Mr. John C. Stedman in full follows:]

STATEMENT BY JOHN C. STEDMAN, THE COPYRIGHT COMMITTEE OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE AMERICAN COUNCIL ON EDUCATION

Mr. Chairman and members of the subcommittee, I am John C. Stedman, Professor of Law, the University of Wisconsin. I am a member of the Special Committee on Copyright Law of the Association of American Law Schools. Representatives of the American Association of University Professors and the American Council on Education have joined in the deliberations of that committee. I appear before you today at their request.

This group urges as strongly as it can that the doctrine of fair use not only be preserved, but be given formal recognition by the Congress, both by express statutory provision and by appropriate language in the final committee report, as it has been earlier in this revision and in House Report No. 2237, 89th Congress, Second Session, pages 61 to 66 (1966). This is a modest, but important, recommendation. It merely suggests, after all, that your committee stand by the approach that the House took in 1967 when it passed an earlier version of the Copyright Revision Bill, and the approach your committee takes at the present time, as evidenced by the language of section 107.

Let me emphasize that we do not seek to remove protected material from copyright control. Nor are we adverse or hostile to the basic premise that legitimate rights in intellectual property should be protected. We accept that premise as a matter of principle, as a matter of public policy, and as a matter of self-interest. There are, after all, within our constituent membership many authors whose scholarly works command high prices in the commercial book market and authors whose royalties compare favorably with the royalties of non-academic authors.

Our main concern is to stress before this committee the soundness of the traditional, judicially-constructed doctrine of fair use, and its fundamental importance in the process of higher education. Those among us who are law teachers are moved by an added sense of urgency and concern. Tradition and precedent play an important role in the judicial development of the law. But there is little case precedent to guide the courts with respect to permissible uses by teachers and researchers. Cases simply did not come up in this area. But given this scarcity of cases, if S. 1361, with its present section 107, were enacted without appropriate legislative history—at a time when educational usage *has* become a controversial issue—courts might interpret this silence as indicating a Congressional intent not to go beyond the precedents of the past. You will recall that Congressional silence in the 1909 Act with respect to the protection of phonograph records, despite the fact that phonographic technology existed at that time, resulted in this important area receiving no copyright protection down to the present time. We would not want to see this costly and unfortunate experience repeated in the educational fair use area, because the Congress failed to speak out on the subject. I should add that the dangers that exist here are aggravated by the sweeping language and reasoning contained in Commissioner Davis' opinion in the *Williams and Wilkins* Case.

In seeking to assure the application of traditional fair use doctrine through express statutory recognition coupled with supportive legislative history, we are moved by the essential importance of the availability of copyrighted materials in teaching and research. First and most basic is the fact that the higher education community, college and university administrators and their faculties, are primarily the institutions in which the ultimate task of transmitting and advancing knowledge is reposed. I emphasize that both research and teaching are involved in this process. Each is indispensable to the other. Effective instruction of the next generation of citizens and professionals requires that the current generation of teachers be involved as researchers at the frontiers of their own individual disciplines and specialties. But if the individual teacher is to discharge this duty, he must be current within his own discipline, and this requires that he have access to the work product of allied researchers.

The exponential rate of growth of knowledge in this generation and its expression in written and other forms, underscores the importance to the scholar and teachers of access to this information. As the volume of published material has risen, the library budgets of colleges and universities are increasingly pressed. The typical library of a major law school must spend a substantial portion of its annual budget to acquire the current volumes of the state and federal reports and the current supplements to the vast array of state statutes, treatises, and looseleaf services. It is not possible for every university and law library to acquire one or more copies of every book needed for research and teaching in the institution.

The relevance of this to the fair use doctrine is, I trust, clear. look at it first from the standpoint of the researcher. A teacher at a good private university in the southeastern United States who is interested in research on a particular topic finds that the basic works relating to that topic are available only at one or two distant universities in the northeast. He may want to consult only one chapter in such a work, or a few pages within that chapter to which he has found a citation in a periodical that is available to him. Access to such information is essential to the scholar. Inter-library "lending" has become the means to such access. A definition of fair use that left it uncertain whether such a portion could be photocopied and thus satisfy the researchers' needs, would frustrate the purposes that underlie the fair use doctrine, and would be inimical to the orderly extension of scientific knowledge.

Although the library associations are appearing here on their own behalf, we consider the need to permit restricted photocopying for the individual scholar so basic to the vital inter-library loan process as to warrant emphasis by us as well.

Turning to the teaching function, the need for reasonable photocopying for classroom purposes closely parallels the need of the scholar. Often a current new item will appear first in a newspaper or other periodical. Or it may be a one or two page excerpt from a voluminous book or article. Whatever its source, the quality of teaching is grealty improved by making the excerpt available to students. Denial of the opportunity to do this does not mean that students and teachers will go out and buy the entire book or periodical. They will simply do without. In short, the cause of education will have been disserved, and the copyright owner will be no better off.

In this connection, we reiterate that we do *not* seek the right to reproduce entire books or other publications. We seek only a clear expression of intent that the fair use doctrine, as set forth in section 107, includes classroom use by a teacher, together with a supportive statement in the legislative history to the effect that classroom use by a teacher was intended to be within he ambit of section 107. In urging this statement we accept the limitations cited in House Report No. 2237, 89th Congress, Second Session, at page 62 (1966) that in determining fair use it is appropriate for a trier of fact to consider the non-profit character of a school, the independent volition of the teacher and the spontaneity of the temporary use by the teacher and the students. We accept also the limitation that compilation of anthologies would be outside the ambit [illegible] fair use.

We reiterate that we do not seek the right to engage in multiple copying out of the context of research and teaching. We seek only the right of the scholar to have access to knowledge through a single copy of such portion of controlled works as are germane to his established research goals, and, for the classroom teacher, to have the right to use current materials in the non-profit and temporary use context that is his normal classroom situation. In this connection we recognize that the effect on the potential market for the copied work is an appropriate factor to be considered in the determination of fair use, but we also recognize that in the overwhelming proportion of cases, any possible adverse effect will be nil or virtually so. Indeed on balance, access to excerpts appears more likely to stimulate sale of the source product than to discourage it.

Two minor clarifications of points that seem implicit in the existing language of section 107 of S. 1361 would make their meaning explicit. We would like to see the legislative history indicates that none of other sections of the Act limit the force of section 107. We would also like the history to show that the fair use doctrine protects the maker of a copy as fully a sit protects the user of that copy.

We conclude as we began with a request that this committee continue the traditional recognition of fair use in the research and teaching context by the enactment of section 107 coupled with supportive legislative history as outlined above.

Mr. STEINHILBER. Mr. Chairman, my name is August W. Steinhilber and I am director of Federal relations for the National School Boards Association.

The National School Boards Association is the only major education organization representing school board members. Our membership is responsible for the education of more than 95 percent of all the Nation's public schoolchildren.

As representatives of the Nation's largest unit of government, both in terms of number and expenditures, our testimony today is not for the benefit of any vested professional or business interest.

We are locally elected officials. We are here as trustees of the taxpayer, who must eventually bear the cost which the limited monopolistic rights arising from copyright protection will entail. The term monopolistic is being used in the nonpejorative sense that to the extent legislative restrictions are placed on the public use of work, society is then being precluded from freely dealing with the ideas presented therein.

Mr. Chairman, may I stray a little from my prepared testimony. Having negotiated with private industry the last few weeks on the energy crisis, where we tried to obtain bids on fuel oil to keep schools open this fall plus retain current natural gas usage which you know is under the Federal Power Commission, I would indicate that any monopoly is indeed dangerous to the public and therefore the responsibility of this committee is very heavy to prevent such from happening in the copyright area.

We know the subcommittee recognizes that great care must be taken to weigh taxpayer cost in striking the balance between intellectual creation and intellectual pursuit. And, it is with respect to the latter, intellectual pursuit—specifically, taxpayer cost as it relates to classroom use of copyrighted materials—that my testimony is directed.

The National School Boards Association supports the balance of interests expressed in the exemption proposed by Mr. Wigren of the ad hoc committee of copyright law revision. In the interest of time, my specific comments will focus on three issues: One, duration; two statutory damages; and three, other than face-to-face "not for profit use."

We strongly oppose an expansion of the current duration period of 28 years renewable for 28 years, particularly to a period as long as life plus 50 years. It totally defies commonsense to assume that the typical artist, in order to have financial incentive to produce, needs a copyright protection which will not only keep him financially secure, but will provide an ongoing source of income for his great-grandchildren. Under the current law, the artist, like the rest of the citizenry, in effect, has a life interest in the sale of his labor, which has thus far proven to be sufficient. Furthermore, except for the relatively rate instances of great works, we sincerely doubt whether the demand for most works in excess of 56 years of age is such that the balance between spot usage and royalties collected by heirs can justify burdening copiers with finding the publisher in interest, and then ordering copies or seeking permission to copy.

In speaking of expanding duration, it would appear that the publishing industry is the real beneficiary of the "life plus fifty" proposal.

Second, we strongly endorse a waiver of statutory damages for innocent educational infringers. As school board members, we have to protect what we would ordinarily consider the ultra vires violations of our teachers and librarians.

Our concern is that such personnel should not be required to proceed with the judgment of a copyright lawyer—many of whom would also encounter difficulties in dealing with the factual complexities which may arise in applying the law on a day-to-day classroom basis. It is our opinion that penal provisions will not serve to deter good faith violations, as much as it will to foreclose teachers from pursuing justifiable exemptions to the law, and, in turn, foreclose the educational public policy which such exemptions seek to protect. In this regard, it can be assumed that school employees, and the units of government which oversee their activities, will operate in good faith and take steps to insure adherence to the law.

Well, in the interest of time--and I know I have taken up too much of that commodity—I will rest my case. My prepared document speaks for itself, and I would like to have an opportunity to answer questions. I would again urge you once again in support of an educational exemption which would place education in the same position or virtually the same position that it now holds.

[The statement of August W. Steinhildber in full follows:]

STATEMENT OF AUGUST W. STEINHILBER, DIRECTOR OF FEDERAL RELATIONS, NATIONAL SCHOOL BOARDS ASSOCIATION

Mr. Chairman, my name is August W. Steinhilber, and I am Director of Federal Relations for the National School Boards Association.

The National School Boards Association is the only major education organization representing school board members. Our membership is responsible for the education of more than ninety-five percent of all the nation's public school children.

As representatives of the nation's largest unit of government, both in terms of number and expenditures, our testimony today is not for the benefit of any vested professional or business interest. Rather, we are here as trustees of the taxpayer, who individually must bear the *pro tanto* cost which the limited monopolistic rights arising from copyright protection will entail (The term monopolistic is being used in the nonperjorative sense that, to the extent legislative restrictions are placed on the public use of work, society is then being precluded from freely dealing with the ideas presented therein).

We know the subcommittee recognizes that great care must be taken to weigh taxpayer cost in striking the balance between intellectual creation and intellectual pursuit. And, it is with respect to the latter, intellectual pursuit—specifically, taxpayer cost as it relates to classroom use of copyrighted materials—that my testimony is directed.

The National School Boards Association supports the balance of interests expressed in the exemption proposed by Mr. Wigren of the Ad Hoc Committee on Copyright Law Revision. In the interest of time, my specific comments will focus on three issues: 1) duration, 2) statutory damages, and 3) other than face-to-face "not for profit use."

We strongly oppose an expansion of the current duration period of 28 years renewable for 28 years, particularly to a period as long as life plus 50 years. It totally defies common sense to assume that the typical artist, in order to have financial incentive to produce, needs a copyright protection which will not only keep him financially secure, but will provide an ongoing source of income for his great grand children. Under the current law, the artist, like the rest of the citizenry, in effect, has a life interest in the sale of his labor, which, has thus far proven to be sufficient. Furthermore, except for the relatively rare instances of great works, we sincerely doubt whether the demand for most works in excess of fifty-six years of age is such that the balance between spot usage and royalties collected by heirs can justify burdening copiers with finding the publisher in interest, and then ordering copies or seeking permission to copy.

In speaking of expanding duration, it would appear that the publishing industry is the real beneficiary of the "life plus fifty" proposal. Even granting that promotion of the arts and sciences may require incentive for commercial sponsors, it is difficult to imagine how promotion could be encouraged by offering protection for a period which may very well exceed the life of the sponsoring individual, or the publishing company, which invested the risk capital. Indeed, it would appear at some point the need to encourage the arts will be discouraged if sponsors can reap long term profits from their past successes.

Second, we strongly endorse a waiver of statutory damages for innocent educational infringers. The nation's school boards can make this endorsement from the detached position of not being liable for the *ultra vires* violations of our teachers and librarians. Our concern is that such personnel should not be required to proceed with the judgment of a copyright lawyer—many of whom would also encounter difficulties in dealing with the factual complexities which may arise in applying the law on a day to day classroom basis. It is our opinion that penal provisions will not serve to deter good faith violations, as much as it will to foreclose teachers from pursuing justifiable exemptions to the law, and, in turn, foreclose the educational public policy which such exemptions seek to protect. In this regard, it can be assumed that school employees, and the units of government which oversee their activities, will operate in good faith and take steps to ensure adherence to the law.

Third, the educational exemption proposed by the Ad Hoc Committee on Copyright Revision is inclusive of those transferring mechanisms which would limit copyright protection beyond face-to-face teaching, such as educational television. While other witnesses can provide expert technical testimony to support such an exemption, we would like to especially emphasize our encouragement for the closed circuit educational television exemption. This teaching device costs the taxpayers millions of dollars every year, and it would be an enormous frustration of that expenditure if the use of educational television was impeded by restrictions, further costs, and delays in clearing administrative restrictions. In addition, it should be noted that the Congress has recognized the educational television priority through special provisions in the Emergency School Aid Act and Title III of the Elementary and Secondary Education Act. Therefore, apart from the taxpayer interest, the tighter the restriction on closed circuit television usage, presumably the less achievable will be Congress' legislated goals in educational innovation and quality integrated education—the purposes of the two acts which I just cited.

Mr. Chairman, this concludes my statement. On behalf of the National School Boards Association, I would like to thank you for permitting us to present our views on the educational exemption to the copyright laws.

Mr. ROSENFIELD. Mr. Chairman, reference has been made to the impact of Williams and Wilkins on the educational community's interest. For the interest and edification of the committee, may I submit a memorandum of law on the impact of the Commission's opinion and its relationship to the House committee report?

Senator MCCLELLAN. You may. It will be received.

[The memorandum referred to follows:]

MEMORANDUM OF LAW

Re: Impact of Commissioner's Opinion in *Williams & Wilkins.*

The Commissioner's decision in *Williams & Wilkins* is inconsistent with the understanding of the House Judiciary Committee on the meaning of "fair use."

The Commissioner's opinion undercuts the House Committee's understanding as to "fair use" in such a serious way as to make it impossible for education safely to accept the House Committee's bill and report at this time.

1. To date, the only action taken by either House of the Congress in connection with copyright revision was that taken by the House in 1966 and in 1967. In each instance, the House Judiciary Committee reported a bill with a report, the last instance being in 1967, H.R. 2512 and the accompanying H. Rep. No. 83, 90th Congress, 1st Session.

2. For the first time, a Congressional Committee proposed statutory recognition of "fair use." Some of the key considerations appeared in the House Committee's respective reports as follows:

(*a*) There were no available judicial precedents for the meaning of "fair use" in connection with nonprofit schools. House Rep. No. 2237, 89th Congress, 2nd Session, on H.R. 4347, pp. 60–1.

(*b*) In proposing statutory "fair use," the House Committee stated: "Section 107, as revised by the committee, is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. . . ." H. Rep. No. 83, *supra*, at p. 32.

(*c*) To give some guidelines of what such statutorily-adopted judicial "fair use" meant, the Committee set forth, in considerable detail and specification, examples of teaching activities which it regard as "fair use" under the judicial doctrine which it was accepting without change.

3. In specific instances of major importance, the views of the House Judiciary Committee as to what "fair use" comprised were diametrically opposed to the Commissioner's decision in *Williams & Wilkins*. This being the case, the educational community cannot at this point safely rely on the views previously expressed by the House Judiciary Committee as to the meaning of judicially-determined "fair use."

4. *Examples*. The divergence between the Commissioner and the House Judiciary Committee are indicated in three items of major importance to the educational and library community, as follows:

(A) AN ARTICLE FROM A PERIODICAL ISSUE

The Commissioner: there is no difference between an article and an entire periodical issue. ". . . each article in plaintiff's journals is protected from infringement to the same extent as the entire journal issue. (p. 6)

House Judiciary Committee: there *is* a difference. "*Single copies of 'entire' works*. . . . The educators have sought a limited right for a teacher to make a single copy of an 'entire' work for classroom purposes. The committee understands that this was not generally intended to extend beyond a 'separately cognizable' or 'self-contained' portion (for example, a single poem, story or article) in a collective work, and that no privilege is sought to reproduce an entire collective work (for example, an encyclopedia volume, *a periodical issue*). . . . With this limitation, and subject to the other relevant criteria, the requested privilege of making a single copy appears appropriately to be within the scope of fair use." (34–5) (*underlining supplied*)

(B) COPY OF ENTIRE WORK

Commissioner: No. ". . . And the courts have held that duplication of a copyrighted work, even to make a single copy, can constitute infringement."

House Judiciary Committee: Yes, under some circumstances. "For example, the complete reproduction of a fairly long poem in examination questions distributed to all members of a class might be fair use . . ." (33)

"There are certain classroom uses which because of their special nature would not be considered an infringement in the ordinary case. For example . . . recordings of performances by music students for purposes of analysis and criticism, would normally be regarded as fair use unless the copies or phone-records were retained or duplicated." (34)

"Allows multiple copies of very short self-contained works." (p. 35)

DIFFERENCES BETWEEN SINGLE AND MULTIPLE COPIES

Commissioner: None. ". . . there is nothing in the copyright statute or the case law to distinguish in principle, the making of a single copy of a copyrighted work from the making of multiple copies . . ." (14)

House Report: There is a difference. "*Single and multiple copying*. Depending upon the nature of the work and other criteria, the fair use doctrine should differentiate between the amount of a work that can be reproduced by a teacher for his own classroom use . . . and the amount that can be reproduced for distribution to pupils . . ." (p. 33) (underlying supplied)

". . . fair use can extend to the reproduction of copyrighted material for purposes of classroom teaching." (p. 33)

The educational community deliberately compromised on some of its major demands in specific reliance upon the understandings set forth in the House Judiciary Committee's report on the meaning of "fair use." The Commissioner's opinion in *Williams & Wilkins* negates the substance of that legislative understanding and renders it unsafe and unwise, at this point, to rely on the understandings set forth in the House Judiciary Committee's interpretation of "fair use." The educational community, therefore, must have clearcut and decisive assurances that the statute will include what is needed for the educational community, in the way of reasonably copying and recording—needs which are rejected by the language as well as the thrust of the Commissioner's opinion.

Senator McClellan. Is that all now?

Mr. Wigren. Mr. Chairman, may I clarify one point before we leave the stand?

Senator McClellan. Yes.

Mr. Wigren. Very frequently I have been asked, does the ad hoc committee's limited education exemption request go beyond the bounds of "fair use"? And I am sure some of the members of your committee would be interested in our interpretation of that question. I would say that our request goes beyond fair use in protection only, but not in substance. In other words, our request goes beyond "fair use" in four ways, as far as protection goes. First, the limited educational exemption would provide certainty that a given practice of teachers in the classroom is permissible. We do not have this certainty now.

Second, the limited educational exemption would provide us freedom from the aura of commercial competition in the normal "fair use" situation; that is, as I pointed out in my testimony, "fair use" is generic in nature and applies equally to both commercial and noncommercial users.

We feel educational users need special protection over and above that provided commercial users, because of their public responsibility. Third, "fair use" is a defense in a lawsuit, and the teacher has the burden of proof under the present statutes. The limited educational exemption on the other hand puts the burden of proof on the publishers. The publisher has to prove that the teacher has infringed.

Finally, the limited educational exemption would protect us in the event there arises another court suit be it Smith versus Jones or whatever you want to call it, which might be similar to Williams & Wilkins. In the event that occurred we would be protected. Otherwise we would have the same thing to do all over again as we are doing today.

Let me point out that we are not asking for more substantive rights, but we are asking for more protection to assure that we get those substantive rights which we feel are appropriate for the educational community.

Thank you, sir.

Senator McClellan. All right. Thank you.

Call the next witness.

Mr. Brennan. We have five separate presentations in opposition to the ad hoc committee amendment. Each witness will be alloted 8 minutes.

Senator McClellan. There goes the bell. I will have to leave to vote, but will be back shortly.

[A brief recess was taken.]

Senator McClellan. The committee will come to order. Call the next witness.

Mr. Brennan. Mr. Chairman, the first witness in opposition to the ad hoc committee's amendment is Mr. Irwin Karp, counsel for the Authors' League of America.

Senator McClellan. All right, Mr. Karp, you may proceed.

STATEMENT OF IRWIN KARP, ESQ., COUNSEL FOR THE AUTHORS LEAGUE OF AMERICA, INC.

Mr. KARP. Thank you, Mr. Chairman.

I have submitted a written statement and I would respectfully request that it be included in the record.

Senator MCCLELLAN. It will be printed in the record in full.

Mr. KARP. I will simply comment on certain portions of my written statement.

The Authors League opposes the proposed educational exemption, which has just been discussed by the illustrious members of the panel who addressed you.

I will focus, as our statement focuses, on those provisions which deal with reproduction, copying, and recording. But I do want to state that the Authors League opposes the other aspects of the exemption which would permit storage and retrieval systems beyond the limits of fair use. And it also opposes the provisions on educational broadcasting, which as we just heard would apparently, in the eyes of the proponents, allow them to go into the wholesale business of using copyrighted materials for the preparation of television programs—involving such substantial investments that they must have even greater power to reproduce copies so they can, as the gentleman just told us, recoup their investment. I think that marvelous little phrase about recouping their investment exemplies a certain failure to envision the problems of producers of educational material and authors who must also recoup their investment. In a sense that myopic vision highlights and emphasizes the problems that have plagued us all through the copyright revision proceedings.

It should be emphasized, at the outset, that what the educators are doing is asking this committee and the House Judiciary Committee to throw out a carefully worked out compromise on the problem of educational copying. The same gentlemen who were before you just now, made the same pleas to the House Judiciary Committee and this committee back in 1967, and then again when this committee held hearings the following year.

The House Judiciary Committee, taking very careful note of all of the arguments, said that because photocopying and other reproducing devices were becoming easier and cheaper, and because of the dangers of educational copying to authors and publishers, a specific educational exemption was not warranted. However, the House Judiciary Committee took several steps to meet and balance the needs of authors and educators. They revised section 107 at the request of the educators to make it explicit that some use for purposes such as criticism, comment, news reporting, teaching, scholarship or research could be fair use.

Then they made a very careful analysis of the four criteria of fair use, which they applied to specific typical classroom situations.

As the committee noted, the analysis had to be broad and illustrative. They said it might provide educators with the basis of establishing workable practices and policies.

Now, in reality the House committee's analysis of fair use, with its explicit examples and illustrations of how it applied to educational copying, was far more precise than the very vague amendment that this committee is being asked to adopt in the name, so we are told, of clarity.

The fact of the matter is that the House report and the draft report of this committee give far clearer guidelines to educators and publishers and authors than this proposed exemption, which concededly would go beyond the limits of fair use.

The House committee said, in its concluding remarks on this subject, that "the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use, and education has something to gain in the enactment of a bill which clarifies what may now be a problematical situation."

Now, that remark, Senator, that judgment and that analysis of fair use is just as valid today as it was when the House Judiciary Committee made the report because there is absolutely nothing in the *Williams* and *Wilkins* decision which changes the concept of fair use as it applies to educators or educational copying. And it requires a tortured reading of Commissioner Davis' very careful opinion—and a very partisan reading—to believe that this changed in any way the work of Mr. Kastenmeier and his committee which was then acceptable to the very people who just sat here before you. So, the decision is simply being used as a pretext to push once more for an exemption, which even the educators recognized after discussion to be——

Senator MCCLELLAN. Oh, we just got a record vote call. I will have to recess for a few minutes, and I will hurry back.

Be at ease until I return.

[A brief recess was taken.]

Senator MCCLELLAN. The Committee will come to order.

Mr. KARP. As I said, the House Judiciary Committee completed its analysis of the problem of educational copying by stressing that the doctrine of fair use properly applied is broad enough to permit reasonable educational use.

Indeed, Mr. Rosenfield, counsel of this committee, very shortly thereafter, speaking for the ad hoc committee, said that the sine qua non of our agreement on the compromise of educational copying, the sine qua non of our agreement, is the present language of 107, unchanged. The proposed educatioal exemption will change that agreement considerably and will change 107.

I might say very briefly, that if the exemption is not intended to go beyond fair use, there is obviously no need for it—although in fact it concedely would go beyond fair use. We analyze this point in our statement and we point out that it would permit various types of copying that do not meet the criterion of fair use, including the most important criteria—whether the use would affect the market value of, or market for, the copyrighted work.

We have discussed this afternoon in other testimony how educational copying can injure authors, and how library copying can do that also, and I will not repeat that analysis.

We then come to the *Williams* and *Wilkins* case, which is the pretext on which the educational community asks for another crack at the educational exemption. In the House Judiciary report it was emphasized that each case raising the question of fair use must be decided on its own facts. And the committee said that "unauthorized library copying, like anything else, must be judged a fair use or an infringement on the basis of all the applicable criteria and the facts of the particular case." That is a well-established doctrine of copyright law.

Now, the facts in the *Williams* and *Wilkins* case were that the two sets of Government libraries engaged in the systematic reproduction, on a vast scale, of copies of entire articles for their own patrons and the patrons of other libraries. In his opinion Commissioner Davis passed no judgment on educational copying in any of the permutations analyzed by the House Judiciary Committee.

What Commisioner Davis did was to confine his decision and opinion to the facts of this particular case, which is always done in fair use cases. He said that based on the facts of the particular *Williams* and *Wilkins case*—on the annual systematic copying of thousands and thousands—and literally millions over a period of years—of journal articles—that this systematic copying was wholesale copying and was therefore not fair use. And he analyzed the criteria of fair use as it applied to those facts only.

He also pointed out that copying of entire articles could, under appropriate circumstances, be fair use and he said that there were many illustrations that might come to mind on reflection. And he re-emphasized that fair use, however, cannot support wholesale copying of the kind here in this suit.

One concluding comment, the educational spokesmen have told you today that "educators" must have access to these materials and they are really dealing with a large industry—publishing—which is only concerned with profiting itself. As a matter of fact, authors and publishers are also "educators" and make valuable contributions to the educational process, which they could not do—if this exemption were established—without considerable loss to themselves. On the other hand, education is one of the top 500 industries in the United States. And there are no educators, to my knowledge, who teach without pay or who occupy schoolrooms or school buildings which are not paid for. The educational system and the school boards do pay for other services and facilities that they use.

It might be pointed out that when teachers feel that the compensation they receive is not adequate, they have a remedy. They are allowed to organize in large groups and boycott the schools. They go on strike, and they stay on strike, keeping the schools shut down, until they receive what they consider adequate compensation. Ironically, they are entitled to do that under an exemption granted by another statute, the Clayton Act because the conduct of the NEA local chapters in various States, in striking schools, is a boycott, which would otherwise violate section 1 of the Sherman Act.

They are able to organize in large groups; namely, union, to fix the prices for their services—which would also violate the Sherman Act were it not for the exemption they have under the Clayton Act. We have no quarrel with that. What we do quarrel with is this new exemption they seek which would prevent publishers and authors from receiving reasonable compensation for their materials and their services, that is, when their copyrighted works are copied, beyond the limits of fair use.

The House Judiciary Committee suggested that where copying beyond fair use was desired by educators, that reasonable, voluntary arrangements should be worked out to make this possible it also suggested that educators, authors, and publishers cooperate in establishing criteria for fair use. We are perfectly willing to do that and we understand that the Association of American Publishers is. We think that these problems can be resolved. But we don't think they can be resolved by dealing a heavy blow to the copyright system, which after all is the underpinning for independent entrepreneurial creation and dissemination of literary, scientific, and artistic works. Because if copyright is undermined by this type of exemption, then the only thing we can do is go to a Government-subsidized system of creation and publication.

Thank you.

Senator McCLELLAN. Thank you.

[The prepared statement of Irwin Karp follows:]

Mr. Chairman and members of the subcommittee, my name is Irwin Karp. I am counsel for The Authors League of America, a national society of professional writers and dramatists. I appear to present its views on the amendment to S. 1361 requested by The National Education Association and other groups ("The Ad Hoc Committee on Copyright Law Revision"). I respectfully request that this statement be included in the record.

The Ad Hoc Committee has requested the Subcommittee to add to the Copyright Revision Bill a new section which would create a "general educational exemption" permitting "educators", "scholars" and "researchers" to reproduce, copy and record copyrighted works beyond the limits of fair use; to store and retrieve materials in automatic systems to a greater extent than permitted by fair use or Sec. 117 of the Bill; and to record and retransmit broadcasts for five days to schools and colleges, a practice which constitutes infringement under the present law, and under the Revision Bill.

The Authors League urges the Subcommittee to reject this proposed exemption because (1) it would permit uncompensated educational copying beyond the limits of fair use, and destroy the reasonable, compromise solution to this problem which is reflected in the Report of the House Judiciary Committee and the draft report of this Subcommittee; (2) the exemption would be extremely damaging to authors and publishers; and (3) there is no substance to the educators' claim that the Williams & Wilkins decision is a valid reason for reviving this request for an educational exemption, which had previously been rejected by the House Judiciary Committee and by this Subcommittee.

We focus our discussion on those provisions of the proposed exemption which deal with the reproduction, copying and recording of copyrighted works. However, we should note that authors are as strongly opposed to those provisions of the NEA amendment which would permit the use of copyrighted materials in storage and retrieval systems beyond the limits of fair use, and to the clause which would permit the recording and retransmission of broadcasts.

(1) THE PRIOR REJECTIONS OF THE "EDUCATIONAL EXEMPTIONS"

As the Report of the House Judiciary Committee notes, the NEA and other members of the Ad Hoc Committee had requested Subcommittee No. 3 to insert "a specific, limited exemption for educational copying" into the Revision Bill. As the draft report of this Subcommittee indicates, the Ad Hoc Committee also requested that this educational exemption be included in the Senate version of the Revision Bill. The House Judiciary Committee refused the Ad Hoc Committee's request, and their "exemption" was not included in the Bill passed by the House, nor in S. 1361 or the prior Senate revision bills. The reasons why the educational exemption was refused by the House Judiciary Committee are as valid today as they were when the Report was issued in 1967; and nothing in Commissioner Davis' opinion in the William & Wilkins case—the Ad Hoc Committee's stated pretext for reviving its "exemption—affects the validity of the Judiciary Committee's reasoning.

The Committee noted that "photocopying and other reproducing devices were constantly proliferating and becoming easier and cheaper to use." It also took note of the contentions of authors and publishers that "education is the textbook publisher's only market, and that many authors receive their main income from licensing reprints in anthologies and textbooks; if an unlimited number of teachers could prepare and reproduce their own anthologies, the cumulative effect would be disastrous." (H. Rep. No. 83; p. 31). The Committee report noted that "several productive meetings" were held between representatives of authors and publishers and of educators and scholars and that "while no final agreements were reached, the meetings were generally successful in clarifying the issues and in pointing the way to constructive solutions." (ibid)

Those constructive solutions were reflected in the Judiciary Committee's report, and it is fair to say they were—for a time, at least—accepted by the parties. The solutions were:

(i) The Committee's rejection of the exemption proposed by the NEA and other members of the Ad Hoc Committee: "After full consideration, the committee believes that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified." (ibid)

(ii) The Committee's explicit recognition and affirmation that "any educational uses that are fair today would be fair use under the bill." (ibid)

(iii) Amendment of Sec. 504(c) to insulate teachers from excessive liability for statutory damages. (ibid)

(iv) Amendment of Sec. 107 to restore a restatement of the criteria of fair use, to indicate it may include reproduction in copies or phonorecords; and "to characterize a fair use as generally being 'for purposes such as criticism, comment, news reporting, *teaching, scholarship* or *research*.'" (emphasis supplied) (ibid)

(v) A careful analysis by the Committee of the four criteria of fair use "*in the context of typical classroom situations arising today*." While, as the Committee noted, the analysis had to be broad and illustrative, "it may provide educators with the basis of establishing workable practices and policies." (H. Rep. No. 83, pp 32–36). Actually the Committee was modest in characterizing its analysis—it is an extremely clear and useful set of guidelines for educators, authors and publishers.

Moreover, the Committee's analysis of fair use in the context of typical classroom situations amply supports its judgment that "*the doctrine of fair use, as properly applied is broad enough to permit reasonable educational use*, and education has something to gain in the enactment of a bill which clarifies what may now be a problematical situation."

The House Judiciary Committee also urged educators, authors and publishers to "join together in an effort to establish a continuing understanding as to what constitutes mutually acceptable practices . . ." (H. Rep. 83, p. 33). The Authors League is willing and ready to join in such a continuing, cooperative effort at any time, as is the Association of American Publishers. The Judiciary Committee also urged the parties to join together "to work out means by which permissions for uses beyond fair use can be obtained easily, quickly, and at reasonable fees." Again, the Authors League is willing and ready to join in such an effort. Indeed, the League is willing—alone, or in cooperation with the Association of American Publishers and educational groups—to seek funds from the National Foundation for the Humanities, to establish and operate a pilot information clearing house to receive requests for permissions, process and transmit them to the appropriate licensor (author or publisher), and expedite the copyright owner's reply. As in the case of librarians, the Committee's suggestion for voluntary efforts to "workable clearance and licensing conditions" is anathema to educational spokesmen—they will not even let the phrase cross their lips, no less discuss it seriously. This is regrettable since a voluntary clearing house could well provide the means of establishing a continuing understanding as to what constitutes mutually acceptable practices . . ."

(2) THE PROPOSED EDUCATIONAL EXEMPTION WOULD INJURE AUTHORS AND PUBLISHERS

If the proposed educational exemption is only intended to permit educational copying that would constitute fair use under the Judiciary Committee's analysis of the 4 criteria "in the context of typical classroom situations arising today"—then the proposed exemption is unnecessary. What was fair use under the Committee's analysis is still fair use.

Actually, the educational groups are seeking—via their proposed exemption—to legalize uncompensated, educational copying that goes far beyond the bounds of fair use. The right to quote "excerpts"—i.e. portions of a book or other work which is not substantial in *length*, in proportion to its total size—would be absolute, *regardless* of the circumstances of the reproduction. Thus, an unlimited number of educators or institutions could then reproduce copies of such portions under a variety of circumstances which would make the reproduction an infringement under the Judiciary Committee's analysis of the 4 criteria, in its report. For example, many copies could be produced on an organized basis, rather than by one teacher, spontaneously. For example, multiple copies could be reproduced for many individuals and circulated beyond the classroom. And most important of all, under the proposed exemption copies could be reproduced even though they had a serious adverse effect on the potential market for the work, or its value—and even though they supplanted some part of the normal market for the work.

Similarly, the proposed exemption would permit educators and institutions to reproduce copies of entire *short* works—a 2 page poem? a five page article? a seven page short story? And as with "excerpts", the exemption would allow educators to reproduce these copies under a variety of circumstances that would make the reproduction an infringement under the Judiciary Committee's analysis of the 4 criteria of fair use.

As we noted in our statement on library copying, and in our previous testimony to the Subcommittee, many authors earn a major portion of their income by licensing the reprinting of poems, articles, short stories and other short works—and excerpts from longer works—in anthologies, text books, periodicals and collections. After it is originally published, the same work may be reprinted with the author's permission in many such books. The accumulation of reprint royalties produces a modest income and for authors of poetry, essays and other works of literary value, it is often the larger part of the compensation they earn from the uses of their writings. Many of these anthologies and other books which reprint the author's short works and excerpts are sold primarily to high schools, colleges, universities and their libraries and book stores—and the student of these institutions are a primary audience for eminent poets, essayists and short story writers. In addition, several courses use articles from journals on various subjects in place of text books.

The proposed educational exemption would allow, educators and educational institutions to produce copies of an author's short works, and excerpts from longer works, thus displacing the sales of anthologies, text books and other collections that formerly reprinted these works. Many authors would thus be deprived of a substantial part of their income—the royalties from the publishers of the anthologies and text books—even though their works would still be widely used by educational audiences, disseminated by uncompensated educational copying.

(3) THERE IS NO JUSTIFICATION FOR REVIVING THE PROPOSED EDUCATIONAL EXEMPTION

The excuse offered by the Ad Hoc Committee for reviving its proposed educational exemption, and thus disrupting the constructive solutions reflected in the House Judiciary Committee's report, is that purportedly Commissioner Davis' opinion in *Williams & Wilkins* created "uncertainties" and indicated "the unreliability of 'fair use' in providing necessary protection for teaching, scholarship and research . . ." (letter from Dr. Wigren of the National Education Association and Chairman of the Ad Hoc Committee, to Mr. Thomas C. Brennan, Chief Counsel of the Subcommittee: Dec. 11, 1972).

In reality, Commissioner Davis' opinion did nothing to change the doctrine of fair use; and it did nothing to change the application of fair use to educational copying, as analyzed in the House Judiciary Report. Educational copying that would constitute fair use under the Judiciary Committee's analysis of the 4 criteria is still fair use.

As the House Judiciary Committee emphasized, "each case raising the question (of fair use) must be decided on its own facts." And the Committee also said that "unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all the applicable criteria *and the facts of the particular case.* (Emphasis supplied.) (H. Rep. No. 83, pp. 29, 36.)

The particular facts of the case Commissioner Davis decided bore no resemblance to the various fact situations involving classroom use or other educational copying which the House Judiciary Committee considered in spelling out its guidelines and analysis of fair use vis-a-vis educational copying. The facts in *Williams & Wilkins* were that two set of government libraries engaged in the systematic reproduction—on a vast scale—of copies of entire articles for their own patrons, and the patrons of other libraries. In his opinion, Commissioner Davis passed no judgment on educational copying in any of the many permutations analyzed by the House Judiciary Committee. On the contrary, he confined his decision and opinion *"to the facts of (this) particular case"*—to this systematic, large volume reproduction of journal articles. What the Commissioner decided was that *"Defendant's* photocopying is *wholesale* copying and meets none of the criteria for fair use" (emphasis supplied). He then said:

> "The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market."

Nothing in the Judiciary Committee's analysis of educational copying and fair use suggested that the systematic process of wholesale copying involved in *Williams & Wilkins* could be condoned as a fair use. Moreover, it should be noted that Commissioner Davis gave examples of photocopying of entire articles that would be fair use and said there are "probably many more which might come to mind on reflection". He then reemphasized that fair use "cannot support wholesale copying of the kind here in suit."

We submit there is nothing in Commissioner Davis' opinion which alters the judicial doctrine of fair use as it applies—according to the Judiciary Committee's analysis—to educational copying, or to library copying. Consequently, there is no justification for the Ad Hoc Committee's effort to revive the educational exemption. Moreover, even if it be assumed that Commissioner Davis' opinion somehow changed the doctrine of fair use as it thus applied to educational copying, that would at most call for an amendment to restore fair use to the contours the Judiciary Committee thought it had. But that is not what the Ad Hoc Committee is asking for—as we noted, it seeks an exemption that would permit educational copying which far exceeds the boundaries of fair use indicated by the analysis of the House Judiciary Committee.

THE "PHILOSOPHICAL" ARGUMENTS

It has become customary for the Ad Hoc Committee to accompany its demands for new limitations on authors' rights with an assortment of "philosophical" arguments—e.g. attacks on the copyright system, suggestions that authors are anti-trust monopolists, and other contentions, including a claim that copyright protection infringes the First Amendment rights of teachers and students. We do not know if the Ad Hoc Committee intends to regale the Subcommittee with this assortment of invalid contentions. Anticipating that it will, we briefly recapitulate our responses, and respectfully refer to our previous testimony for a fuller discussion of these points. Moreover, if the Subcommittee wishes a fuller response to any such contentions which the Ad Hoc Committee may make, we will be pleased to supply it.

These are some of the contentions which have been made by various members of the Ad Hoc Committee, in Copyright Bill hearings and in the Williams & Wilkins case, and summaries of our replies:

(i) Ad Hoc members argue that copyright is a "monopoly" in the anti-trust sense. But an author's copyright does not give him the power to restrain or monopolize the business of book publishing. Copyright is a "monopoly" only in the innocuous sense that all property is—a collection of rights granted by law.

(ii) Ad Hoc members argue that exemptions are justified because a copyright is not property, but "only" rights granted by statute. But all property consists of rights granted by the State, through legislation (e.g. land grant acts) or court decisions. At common law the author's work is his absolute, private property.

(iii) Ad Hoc members argue that copyright is only a "discretionary" grant because Art. I, Sec. 8 says "Congress shall have the power . . ." But the phrase precedes the enumeration of all powers, e.g. to tax, raise armies, borrow money, regulate. The authors of the Constitution did not consider the exercise of these powers, including enactment of copyright laws, as "merely discretionary."

(iv) Ad Hoc members argue that uncompensated library and educational copying must be permitted because they promote the progress of science and art. But the economic philosophy underlying the copyright clause, according to the Supreme Court, was to grant enforceable rights to authors and publishers to encourage individual effort by personal gain; that the independent, entrepreneurial system of creation and dissemination best served the public interest in promoting science and art.

(v) Ad Hoc Committee members argue that exemptions must be granted because library and educational copying is "non-profit." But as the House Judiciary Committee said, "the educational groups are mistaken in their argument that a 'for profit' limitation is applicable to educational copying under the present law."

(vi) Ad Hoc members argue that any copyright limitation on uncompensated library or educational copying restrains "freedom" to read under the First Amendment. But the First Amendment "was fashioned to assure unfettered interchange of ideas (376 U.S. 269) and it is axiomatic that an author's copyright does not prevent anyone from discussing or repeating his ideas (366 F. 2d 303). The Supreme Court has never interpreted "freedom" in the First Amendment to mean "gratis" or "free of charge"; and it has frequently emphasized there is no conflict between publication for profit and the First Amendment.

It is indeed strange that the National Education Association should argue, as it did in *Williams & Wilkins*, that requiring compensation to copyright owners, for library copying that exceeds fair use, violates the First Amendment freedom to read. NEA teachers insist on their right to be adequately compensated for making published materials available to students, and for other teaching services. To obtain what they consider adequate compensation, teachers—by the thousands each year—deny students access to books and other copyrighted materials for prolonged periods of time; their strikes close down schools, school libraries and classrooms. Ironically teachers are thus able to deny students access to copyrighted materials by grace of federal legislation—the exemption of the Clayton Act makes it possible for large groups of teachers to engage in boycotts (strikes) that would otherwise violate Sec. 1 of the Sherman Act; and for these large groups of teachers to combine and fix the prices for their services, which also would otherwise violate the Sherman Act. By contrast, copyright owners do not seek to close down schools or libraries, and do not seek to prevent schools and libraries from making reprints of copyrighted articles; copyright owners simply ask that reasonable compensation be paid them when library or educational copying exceeds the boundaries of fair use.

The Authors League thanks the Subcommittee for this opportunity to present its views on the proposed Educational Copying Exemption.

Senator McCLELLAN. Senator Burdick will be here in a few minutes. I have to go now. It is almost 4 o'clock.

[A brief recess was taken.]

Senator BURDICK [presiding]. Call the next witness.

Mr. BRENNAN. Mr. Chairman, the next witnesses appear on behalf of the Association of American Publishers, Inc.

Mr. Sackett, would you identify yourself and your associates for the record?

STATEMENT OF ROSS SACKETT, ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS; ACCOMPANIED BY W. BRADFORD WILEY, CHAIRMAN OF THE ASSOCIATION'S COPYRIGHTS COMMITTEE, AND CHARLES LIEB, COUNSEL

Mr. SACKETT. I am Ross Sackett, president of the Encyclopædia Britannica Education Corp., and am appearing here today on behalf of the Association of American Publishers, Inc., of which I am currently the chairman.

I am accompanied on my left by Brad Wiley, chairman of the association's copyright committee and on my left by Charles Lieb, our copyright counsel.

The association is a trade association organized under the laws of New York State and is composed of publishers of general books, textbooks, and educational materials. Its more than 260 members, which include many university presses, and religious book publishers, publish in the aggregate the vast majority of all general, educational, and religious books and materials produced in the United States.

In the few minutes available to me I would like to summarize our objections to the educational exemption proposed by the National Education Association Ad Hoc Committee on Copyright Law Revision. With your permission we will file a full statement for the record on or before August 10.

Senator BURDICK. Without objection, it will be received.

Senator BURDICK. Proceed.

Mr. SACKETT. In our view, the proposal for an educational exemption is unwarranted and should be rejected for an number of reasons, among which are the following:

One. The exemption is unnecessary and redundant insofar as the classroom teacher is concerned. There is no evidence in our opinion of any unmet real needs of the teacher which are not amply provided for under the fair use doctrine. In this connection it is important that you know that we have on many occasions offered to cooperate with the ad hoc committee to establish guidelines for the use of the classroom teacher which we are confident would eliminate much of the existing uncertainty about what he may copy. Neither the NEA nor the ad hoc committee has been willing to cooperate with us in such an effort but we remain hopeful that they will do so.

Two. To the extent that the proposed educational exemption would permit educators to copy educational and research materials without paying for its use it would, because of its confiscatory effect upon publishers, retard and ultimately perhaps choke off the creation of further material.

Three. The exemption is so sweeping, so imprecise, and so overlapping of other provisions of the revision bill that its adoption would destroy the series of compromises which are delicately balanced in the bill as presently drafted. In other words, to give serious consideration at this late date to the proposed educational exemption would require at the very least a reexamination of the fair use provisions of section 107, the library reproduction provisions of section 108, the classroom teaching provisions of section 110, and of other sections of S. 1361 as well.

Four. In addition to the exemption requested for the single and multiple copying of literary, pictorial, and graphic works, the ad hoc committee proposal would permit the free and unrestricted input of copyrighted works into computer systems, the retrieval of which would be subject to "rules otherwise applicable under the law." What the ad hoc committee has in mind, obviously, is that input of works in copyright should be free (an encyclopedia or reference work for example) and that bit-by-bit retrieval should be permitted, without payment, under the claim of fair use. Also that input should be free so that internal computer manipulation of the copyrighted material would also be free.

The proposal is destructive, illogical, and unnecessary. If adopted it would bypass or undercut the function assigned to the national commission under title II to study the reproduction and use of copyrighted works in conjunction with computer systems, and the provisions of section 117 which would leave existing law as it is until action is taken on the recommendations of the national commission.

The ad hoc committee's present request for an educational exemption is an attempt to revive a proposal which was considered a number of years ago by the House Committee on the Judiciary, was flatly rejected by the committee, and was then abandoned by the ad hoc committee in the hearings before this subcommittee.

In its report the House committee said that the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use. It suggested however that teacher and publisher should join together to establish ground rules for mutually acceptable fair use practices, and that they should work out means by which permissions for uses beyond fair use can be obtained "easily, quickly, and at reasonable fees."

We share the views expressed by the House committee; we urge that they be adopted by this subcommittee and that the proposed educational exemption be rejected out of hand.

For our part, we renew our efforts to meet with the ad hoc committee to establish ground rules for fair use and to establish workable arrangements for the clearance of permissions for uses beyond fair use.

Thank you.

Senator BURDICK. Thank you very much.

The clerk?

Mr. BRENNAN. Mrs. Bella L. Linden, copyright counsel, on behalf of Harcourt Brace Jovanovich, Inc., and Macmillan, Inc.

STATEMENT OF AMBASSADOR KENNETH B. KEATING, HARCOURT BRACE JOVANOVICH, INC., AND MACMILLAN, INC.

(NOTE: Following testimony was given during the morning session.)

Mr. KEATING. I would like to turn now to the general educational exemption.

Senator MCCLELLAN. This would appear appropriate for our afternoon session. I would like to let it appear in the record when we are hearing testimony on that. If you want to insert it in the record now, or read it.

Mr. KEATING. The general educational exemption?

Senator MCCLELLAN. Yes.

Mr. KEATING. But you would like to have it in the record later?

Senator MCCLELLAN. In the afternoon, so it would have continuity with the other testimony.

Mr. KEATING. Could I be heard on it now?

Senator MCCLELLAN. Yes, you may proceed.

Mr. KEATING. Section 110 of both the House act and S. 1361 specifically exempts certain educational or instructional performances and displays from the rights of copyright proprietors. These provisions are in addition to the generally applicable doctrine of fair use set forth in section 107. We are not here to oppose them.

We understand, however, that certain interests are urging the adoption of a broad based "educational" exemption transcending the limits of sections 107 and 110 and such an extension we do object to.

Certainly, the educational needs of our country are of the highest priority. We must not, however, ignore that such needs are served by a publishing industry whose continued vitality depends upon the very incentives of private ownership attacked by advocates of educational exemptions. The textbooks, audiovisual materials, reference works, films, and so forth, to be subjected to free use under such exemptions emanate from publishers who make very substantial investments in research, design, packaging, consultation, and training, as well as in manufacture and marketing. For such investments to continue, the economic incentives envisaged by our constitutional premise of copyright must be maintained.

Of course, education is in the public interest—but this interest is served in our system by private, commercial businesses which require a profit to survive. The erosion of the rights and incentives accorded by copyright will endanger rather than serve the educational needs of our country.

May I repeat a short statement that I made before the House subcommittee in 1955: Will . . . publishers continue publishing if their markets are diluted, eroded, and eventually, the profit motive and incentive completely destroyed. To pose this question is to answer it. I have been a teacher myself. I know of no higher calling and no more dedicated group of our citizenry than those who instruct and guide the youth of our land. I have been in the nature of a crusader at all levels of government to provide higher pay and more benefits for teachers. Just as I feel that they should be amply rewarded for their hard work and dedicated service, so it seems to me should those who author and prepare the material which the teachers use in their work.

Our concern with the erosive and preemptive effect of educational exemptions is not limited to the domestic scene. It is particularly relevant to the recent accession of the United States to the 1971 Paris Revision of the Universal Copyright Convention. This revised treaty grants broad prerogatives to an undefined class of developing countries—at least 80 countries by latest count—to engage in unauthorized reproduction and translation of works under compulsory licenses.

Although expressed as "compulsory licenses," the standard of compensation established in the treaty and our international experience leave no doubt but that the remuneration to be expected under these provisions will be negligible. The end result is that the U.S. Government, in effect, has acquiesced in advance to alien expropriation of rights of a class of American citizens—U.S. authors and publishers.

These compulsory licenses are, at least in theory, circumscribed by references to educational purposes. For the analysis it provides concerning the effects of educational exemptions on authorship and publishing, I ask that this subcommittee receive Mrs. Linden's testimony before the Senate Foreign Relations Committee concerning ratification on the revised Universal Copyright Convention as exhibit B to my statement.

Senator McClellan. It may be received and made exhibit B to the witness' statement.

Mr. Keating. During the hearings before the Committee on Foreign Relations, the publishers I represent took the position that if the revised convention be ratified by the United States, Congress adopt legislation to assure U.S. authors and publishers compensation for the economic injuries they would suffer upon implementation of the compulsory licenses by the developing countries. The rationale and precedent for such legislation is fully discussed in Mrs. Linden's testimony which I have offered as exhibit B.

When the Senate advised and consented to ratification of the treaty on August 14 last year, reference was made in debate to the consideration of incorporating such a compensatory provision in subsequently enacted domestic copyright legislation. We believe that a particularly appropriate vehicle to insure such consideration is the National Commission proposed in title II of S. 1361.

We therefore propose that the mandate of the Commission be broadened to include an investigation of the effect of the 1971 Paris Revision of the Universal Copyright Convention on the rights, markets, and businesses of U.S. authors and publishers and the recommendation of legislation to compensate such authors and publishers for injuries to their interests ensuing from that treaty.

STATEMENT OF MRS. BELLA L. LINDEN, COPYRIGHT COUNSEL, ON BEHALF OF HARCOURT BRACE JOVANOVICH, INC., AND MACMILLAN, INC.

Mrs. LINDEN. The educational exemption in all of the illustrations given by the earlier speakers dealt with classroom use. Also, an urgent and sincere plea was made by Dr. Wigren that they are not part of the commercial sector and that all they are interested in is improving teaching.

Now, I thought that part of the record should include a page, an advertising page, from Advertising Age of July 9, 1973, in which Today's Education magazine is listed as the best seller in education and in which the income of teachers, their travel expenses, et cetera is also listed. I may say as an aside that the Authors League would be rather impressed with the travel, income, et cetera, as listed in Today's Education magazine.

May I further add that Today's Education lists a circulation of 1,189,755 and a page rate of advertising, which is what they are searching for, is $4,950. Underneath this are listed the competitive educational magazines that reach the teachers and the school market. Two of my clients are listed underneath, not even as a poor second, but as a third and fourth.

The current issue of Literary Marketplace indicates that Today's Education was formerly known as the NEA Journal and is published by the National Education Association and in the footnote it says, "occasionally uses excerpts from books."

I would like, if I may, to present the original of the Advertising Age advertisement and the marked part of the Literary Marketplace for your consideration, Senator.

Senator BURDICK. The two documents are received for the committee files.

Mrs. LINDEN. The point I would like to make is that contrary to what the teachers believe and what they want, the technical language which they are asking for is more than a mere protection for the educational area, but a competitive position taken by the educators in the name of noncommercial and nonprofit enterprise.

Now, with respect to computer technology and their urging of exemption there, it is very disheartening and disconcerting that those who talk in the name of the public welfare and proclaim that all they are asking for is access and availability, are really not talking about access or availability but an unwillingness to pay.

There is another basic issue here that should be of great concern to those interested in the public welfare—and I know that I count this committee of Congress amongst those that are genuinely interested in the public welfare—and that is the problem that, if you open the door to free, gratuitous, unauthorized, and unpoliced input into information systems, you are also opening the door to truncation, distortion, dilution, and basically censorship of any piece of authorship. The report of the Cosat I panel to which I referred this morning goes to great depths into the problems of censorship that would result from unauthorized and unpoliced input in information systems.

I urge that copyright legislation not be used as a vehicle to open the door to genuine difficulties of antitrust, monopoly, censorship, and distortion of information analyzed by the Cosat I panel.

And I urge this committee to recognize that the specific technical language of this proposed exemption is diametrically opposed to the purpose and intent of copyright legislation generally.

I conclude by respectfully requesting that this committee look to the proposed national commission, to which I referred this morning, to get impartial, appropriate, in-depth information, particularly from the technocrats and the hardware manufacturing field people, and from the publishers, authors, and teachers in the field so that your committee will have an appropriate report and can base its decision on the legitimate balancing of interests rather than this random focusing on one or two exceptions, or one or two emotionally charged situations.

Thank you.

Senator BURDICK. Thank you.

[Exhibit (B) referred to by Ambassador Keating follows:]

EXHIBIT B

STATEMENT OF BELLA L. LINDEN ON RATIFICATION OF THE PARIS REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION

Mr. Chairman, and members of the Committee, my name is Bella L. Linden. I am a partner in the law firm of Linden and Deutsch, and am appearing on behalf of Crowell Collier and Macmillan, Inc., and Harcourt Brace Jovanovich, Inc. Crowell Collier and Macmillan and Harcourt Brace Jovanovich are among the five largest educational publishers in the United States.

Mr. William Jovanovich, Chairman and Chief Executive Officer of Harcourt Brace Jovanovich, Inc. and Mr. Raymond Hagel, Chairman of the Board, President and Chief Executive Officer of Crowell Collier and Macmillan consider this Committee hearing to be of such fundamental importance to the interests of educational, professional and scientific authorship and publishing that they both are here today. May I present Mr. Hagel and Mr. Jovanovich; both are available to answer questions.

I was among the panel of advisors to the United States delegations to the Stockholm Conference for revision of the Berne Copyright Convention in 1967 and to the Paris Conferences for revision of the Berne and Universal Copyright Conventions in 1971. I was counsel for many years to the American Textbook Publishers Institute, which has recently merged with The American Book Publishers Council. I was a member of the Panel of Experts appointed by the Register of Copyrights to consider revision of our domestic copyright law, and am now a member of the Committee on Scientific and Technical Information (COSATI) of the Federal Council for Science and Technology and Chairman of the COSATI sub-panel on rights of access to computerized information systems.

I was present at the Stockholm Conference five years ago when the Stockholm Protocol for Developing Countries was railroaded to adoption as part of a revision of the Berne Copyright Convention. The Stockholm Protocol granted, in substance, the same broad concessions to the eighty so-called developing countries for use of others' literary properties as are before this Committee for consideration. The United States delegation was then among the leaders in its vocal and active objection to the Protocol. The Stockholm Protocol was so effectively criticized in the developed countries that it never came into effect.

In July, 1971 diplomatic conferences at Paris led to parallel revisions of both the Universal and Berne Copyright Conventions. The draft documents for the Paris revisions were principally designed to make it cheaper for developing countries to use intellectual property created by authors and publishers in the developed countries, but these drafts were also intended to give authors and publishers of the developed countries adequate protection for the fruits of their labors. During the Paris conferences, however, the same bloc of countries which operated at Stockholm again railroaded concessions so that the Paris revision of the Universal Copyright Convention now before this Committee, albeit in different verbiage, effects the same results as the Stockholm revision which the United States Delegation, the Copyright Office, and representatives of those interested in protecting private property rights in literary property so successfully decried after Stockholm.

I recognize among those who have testified this morning some of my most vocal and staunch friends in the successful effort to defeat the Stockholm Protocol. All grow older; apparently, some more tired than others. To paraphrase an indelicate cliche, I seem to perceive the prevailing attitude today as—if an Act is inevitable, relax and accept it. Apparently this holds especially true with respect to the Paris revisions of the Universal Copyright Convention.

What all objected to at Stockholm, and what we object to today, is the following. The Universal Copyright Convention as revised at Paris:

1. Establishes a vehicle for the expropriation of the private property of American citizens without adequate compensation. Senate ratification of this treaty will constitute prior, formal United States approval of multi-national expropriation in form and magnitude without precedent in our history;
2. Effectively eliminates in excess of eighty countries from a normal and needed market of American authors and publishers; and
3. Is entirely self-defeating in terms of the concept of international copyright.

In discussions and correspondence which have taken place prior to today's hearing, it has been explained that the Executive Branch of the Government views the Paris revision in terms of foreign economic assistance and a national policy commitment to help fulfill certain needs of the developing countries. We do not agree. The educational budget of a developing country is spent for school construction, teachers' salaries, and classroom equipment. The cost of textboks generally amounts to less than five percent (5%). Authors' royalties normally might represent about ten percent (10%) of this five percent, a fraction of one percent (1%) of the educational budget, but representing a substantial loss of income to individual authors—hardly among our most affluent citizens. Thus, while the loss of potential royalties would be sore deprivation to educational authors and severely disabling to American educational publishing, the financial contribution to education in developing countries is illusory.

The revised Universal Copyright Convention does not provide developing countries with printing presses, nor make any effort to encourage the development of indigenous industry and native creative effort in the developing countries. The fact is that the provisions respecting foreign manufacture of works produced under the compulsory licenses granted the developing countries under the Paris revisions will lead to the establishment of publishing consortiums of private wealth operating on a profit making basis, serving a safe market protected from American competition, and not even offering the possibility of employment to citizens of the developing countries.

Much has been made by the proponents of ratification of the fact that the concessions are limited "only to teaching, scholarship and research." They point out that compulsory translation licenses may only be granted for the purposes of "teaching, scholarship or research", while compulsory reproduction licenses are limited to use in connection with "systematic instructional activities".

The proponents of ratification therefore contend that expropriation of the rights of American authors and publishers is limited only to all of the textboks, audio-visual materials, scientific, technical and reference works, film and microforms, and programmed learning materials of Crowell Collier and Macmillan, Harcourt Brace Jovanovich and all other American publishers of similar products and all of the authors who create the works of education, research and scholarship. Their "modest" demand is that, in the national interest, these companies and authors must forego their entire market in more than 80 countries.

THE AUTHORS OF EDUCATIONAL, SCIENTIFIC AND RESEARCH WORKS

The authors of educational, scientific and research works are not the highly publicized personalities who write best sellers and appear on late evening television talk shows. Most are practicing teachers. Few become rich as a result of their writings. They do not have an organization to speak for their interests. The cooperative relationship between publishers and authors of textbooks, scientific and technical works is such that traditionally these authors look to their publishers to protect their interests. Accordingly, although not designated by anyone as their official spokesman, it falls upon us to call their interests and needs to the attention of this Committee.

To the extent it is possible to describe a "typical textbook author," he or she is a member of the faculty of a highly regarded, though probably not Ivy League, college or university, enjoys an excellent reputation in his or her own field but is little known outside of it, has an income well under $20,000 a year and counts on royalties to pay for braces for the children's teeth, a second car for the family, a vacation or study year abroad or some similar expense. More often than not, royalties on textbooks, reference works, or professional books are split between several authors. Sole authorship of an educational or reference work usually entails many thousands of hours over a period of several years doing library and other research, field-testing and consulting.

Authors' royalties on school textbooks average about 6.3 percent of the total selling price: on college and professional works authors' royalties represent an average of 15.8 percent of sales—in either case a small fraction of one percent of any nation's total educational expenditures.

THE PUBLISHERS OF EDUCATIONAL SCIENTIFIC AND RESEARCH WORKS

The role of American educational publishers combines many of the functions of literary expression, artistic design and technical skills in applied research, packaging, consulting and training as well as manufacture, marketing and distribution. Except in the case of scientific and technical works, it is rare for an author to submit a finished work to his publisher. By and large it is the publisher who discerns educational needs, searches out and selects the author (or, more commonly, groups of authors) to create the books and materials to satisfy the requirements of schools and universities, and directs and supervises the planning, design and creation of the works. In the case of innovative materials, the publisher also provides consultants and conducts workshops to train teachers in the use of the new teaching tools.

The traditional stock-in-trade of the educational publisher has been the textbook and the somewhat later developed "Teachers Edition". Beyond these traditional learning media, technological progress has created the market and technique for a variety of innovative materials of the new educational media. Thus, filmstrips and slides, motion pictures, transparencies, sound recordings, video cassettes and tapes, microform reprints, computer-assisted learning materials and similar elements of "multi-media", "audio-visual" and "programmed" instruction are finding wide use in the school room. Closed system broadcasting has created another vehicle for bringing these materials, as well as the more traditional products of educational publishing, into use. Let no one confuse the notion of "developing" countries with an inability or disinclination of such countries to utilize these innovataive materials or the vehicle of broadcasting. It was not academic considerations which led the Paris draftsmen to make specific provisions for concessions with respect to "audio-visual fixations", and the Report of the General Rapporteur of the Paris Conference (UCC) notes that "it was urged that broadcasting is coming to play a more and more important part in the educational programmes of developing countries . . ." (Report, par. 82).

Very large investments are needed to produce a major instructional program. It is not at all uncommon, for example, for a publisher to invest more than one million dollars in prepublication development costs alone for the creation of an elementary reading program which will take five or ten years to reach the market and another three to five years to gain acceptance and even to begin to pay off the investment. It has been estimated that the preliminary investment in plates for a single high school history textbook, workbook, teachers manual and test combination may exceed one hundred thousand dollars. With the wide acceptance of the types of innovative educational materials noted above, the investment of time, effort and money of educational publishers in their products increases multifold.

In many respects publishing exists apart from other businesses. Educational publishers are in a very real and essential sense engaged in public service; they are also engaged in the operation of commercial businesses. To progress, the educational publisher must anticipate and effectively serve a broad range of instructional and scholarly needs. To survive, the educational publisher must make a profit.

Academic Press, a subsidiary of Harcourt Brace Jovanovich, is the largest scientific and technical publisher in the United States and enjoys a large foreign market for its works. The pressures for scientific and technical progress in the so-called developing countries are so widely known that for the purpose of this hearing it seems only necessary to state that the Paris revisions will adversely affect the interests not only of the authors and publishers of scientific and technical works, but also of American manufacturers of products which find their relevance in technology. Obviously, the preemption of more than eighty countries as a market for these publications is a serious erosion of the rights and incentives that we have traditionally accorded to American citizens.

THE DEVELOPING COUNTRIES AS A MARKET FOR AMERICAN EDUCATIONAL, SCIENTIFIC AND RESEARCH PUBLISHING

Assisting in the educational progress of developing nations is a matter of urgent commercial as well as social interest to American educational publishers. As our own school age population ceases to grow, they must look overseas for future market growth. Some 63 percent of the world's school age children live in the developing countries. The export market for textbooks, which used to be almost entirely British, increasingly is becoming an American market, particularly in scientific and technical fields. The Macmillan Company, a subsidiary of Crowell Collier and Macmillan, tells me that the developing countries account for between 37 and 38 percent of its total export.

The developing countries as a market for the products of American publishing are not limited to original editions of new works. It is generally conceded that the largest number of translations throughout the world are made of American and British publications; similarly, the widespread adoption of the English language has created a great foreign demand for facsimile reprints of prior American works

A short time ago our office prepared an analysis of the Paris revisions and a set of charts comparing the provisions of the Stockholm Protocol and the Paris Convention with respect to the issues that reach the jugular of educational, scientific and technical publishing. We analyzed the concessions to be accorded to the developing countries and we concluded that in each instance where Stockholm gave away six, Paris gives away a half dozen. A distinction in form without difference in substance. Annexed as Exhibit A is the statement of our analysis and the supporting charts.

This statement was circulated on behalf of Crowell Collier and Macmillan and Harcourt Brace Jovanovich among various interested groups and individuals, including members of this Committee, other members of the House and Senate, and the State Department. Many have responded with deep concern for the damage the Paris revisions will inflict on American authors and publishers and have expressed support for our position that ratification can only be justified if steps are taken to insure compensation for such injuries.

In a letter to the Chairman of this Committee, the State Department responded to our earlier statement and analysis. The Department's response included charts prepared by the Copyright Office which compared the provisions of the Stockholm Protocol and the Paris revisions.

We must emphasize in all fairness that nowhere in their response did the Department claims that the Copyright Office charts in any way contradict the charts prepared by our office. Nor did the State Department in any manner respond to our position that monetary compensation must be a *sine qua non* of ratification. We appreciate that in their official capacity the State Department did not find it appropriate to express their views on compensation. Perhaps, in the subtleties of diplomatic correspondence, their failure to comment on our request for compensation may be construed as a silent expression of sympathy.

With respect to ratification, the State Department appears to feel that formal accession to the demands of the developing countries for free access to American works is the only alternative to those countries unilaterally obtaining such access.

Threats by foreign countries to expropriate American property are not unprecedented. However, I do not recall any instance in our history where the Senate has consented in advance to such expropriation because of fear that such threats would be acted upon.

Exhibit B is the letter of the Department of State to Chairman Fulbright. Exhibit C is our response to the Department's comments.

The accuracy of our analysis of the Paris revisions is supported in an article entitled "Downgrading the Protection of International Copyright," by Irwin Karp, counsel to the Authors League. In this article, annexed as Exhibit D, Mr. Karp carefully examines the operation of the Paris concessions in the light of the real facts of publishing life. He concludes that the compulsory licensing system established by the revised Convention is a "dismal prospect" for authors in both the developed and developing countries and that "a careful analysis of the effects and consequences of the two new conventions is imperative, before the Senate decides what action the United States should take." I would note that the authors group represented by Mr. Karp whose interests he sees as "dismally" affected generally does not include the authors of educational materials, whose futures are that much dimmer.

Exhibits A, C, and D fully explain our position with respect to ratification and compensation and contain supporting analysis and precedent. At this point, I will only summarize our conclusions.

THE REVISED UCC ESTABLISHES A VEHICLE FOR THE EXPROPRIATION OF THE PRIVATE PROPERTY OF AMERICAN CITIZENS WITHOUT ADEQUATE COMPENSATION

The revised Universal Copyright Convention withdraws property, representing substantial investment of time, effort and money, from the control of its owner, substituting a national agency of a developing country and allowing it to deal with such property as it sees fit in the name of teaching, scholarship and research. What clearer example can there be of expropriation, defined in the dictionary as "to dispossess (a person) of ownership."

There is nothing in this country's history or experience with foreign nationalization of American businesses which would give us any reason to expect that the developing countries will have a reasonable concept of "adequacy" of compensation in dealing with the literary property of American authors and publishers.

THE REVISED UCC EFFECTIVELY ELIMINATES IN EXCESS OF EIGHTY COUNTRIES FROM A NORMAL AND NEEDED MARKET OF AMERICAN AUTHORS AND PUBLISHERS

We have previously described the interests of American authors and publishers of educational, research and scientific materials in the developing countries as a market. The provisions of the revised convention will effectively bar these countries from reach; indeed, certain provisions of the revision will give impetus to the establishment of foreign publishing enterprises, operating on a profit making basis and servicing a safe market of developing countries. There can be no legitimate reason for depriving American publishers of the opportunity to serve these markets, either through export or cooperation in the development of indigenous publishing.

American publishers are not insensitive to certain specific needs of the developing countries; it is an established practice of several American publishers to manufacture special editions of their works in foreign countries in order to make inexpensive copies available to foreign students. However, to make such special provisions a matter of national economic assistance policy rather than individual initiative requires that our government either assume the function of providing the assistance or assume the responsibility of assuring compensation to our authors and publishers for their enforced contributions.

Compared with other businesses of similar size, publishers own very little in the way of physical plant or manufacturing facilities. Their assets consist of the copyrights they control. Their ability to invest in the future—that is in the development of tomorrow's educational tools—depends upon the present and prospective income produced by their backlists of copyrighted works produced in past years to meet current educational needs.

Since 1962, Crowell Collier and Macmillan has invested over $1,750,000 in the development and continual updating and expansion of the Collier-Macmillan English program. This program, created primarily for use in teaching English as a foreign language in the developing countries, is the most extensive of its kind ever produced by an American company and paid for out of its own resources. It is used virtually throughout the world. Considering the attitudes expressed toward educational publishing and embodied in the operation of the revised Universal Copyright Convention, American publishers world, at the very least, have very serious doubts as to the advisability of such an investment today.

IF THE REVISED UCC IS RATIFIED BY THE SENATE, CONGRESS MUST PASS LEGISLATION ASSURING DOMESTIC AUTHORS AND PUBLISHERS OF COMPENSATION FOR THEIR ECONOMIC INJURIES

In 1962, Congress passed a Trade Expansion Act designed to make possible the Kennedy Round of tariff reductions. The Act incorporates a number of adjustment assistance provisions designed to assist those workers and industries injured by lowered tariffs. In sending the preliminary form of this Act to the House, President Kennedy stated:

"When considerations of national policy make it desirable to avoid higher tariffs, those injured by that competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the Federal Government."

* * * * * * *

"Just as the Federal Government has assisted in personal readjustments made necessary by military service, just as the Federal Government met its obligation to assist industry in adjusting to war production and again to return to peacetime production, so there is an obligation to render assistance to those who suffer as a result of national trade policy." [H. Doc. #314, 87th Cong. 2d. Sess.]

In the debates on the bill, a number of Senators and Representatives reiterated this principle of governmental responsibility. Thus, Senator Mansfield stated:

"These import-affected workers would not be casualties of supply and demand or any other impersonal economic force. Instead, their unemployment would be directly attributable to a decision of the Federal Government taken in the national interest. Certainly, the Federal Government would owe a special obligation to those injured by such actions."

This philosophy of governmental responsibility to compensate private citizens injured in the interests of national policy was expressed by many other members of the House and Senate in the 1962 debates. In that instance there was no agreement by the United States, through tariff reductions, to permit foreign countries to set their own "adequate" price on American products. The mere threat of decreased protection to American industry and labor under the Trade Expansion Act provoked the strong and justified response of the Administration and Congress that the Government must compensate for private injury caused by concessions to public policy.

Obviously, therefore, where American goods and services—the intellectual products of American authors and publishers—are concerned, we look forward with confidence to the reinforcement of the philosophy of the Senate as clearly expressed in the Trade Expansion Act of 1962.

RECOMMENDATIONS

In concluding our testimony, we recommend that this Committee reject ratification of the Paris revision of the Universal Copyright Convention. At the very least, we urge that this Committee delay any action on ratification of the revised Universal Copyright Convention until it has made careful study of the effect of the Paris concessions on American authors and publishers, and after the attitudes of other developed countries have been expressed by formal action of their governments.

Recognizing that the issue of domestic compensation is not within the jurisdiction of this Committee, we urge that in reporting its decision to the Senate this Committee express its concern for the injury to American authors and publishers which will accompany ratification and recommend the adoption of appropriate remedial legislation, as was done in the case of the Trade Expansion Act, in the event the treaty is ratified.

EXHIBIT A

LINDEN AND DEUTSCH,
New York, N.Y.

UNIVERSAL COPYRIGHT REVISION TO BE SUBMITTED TO CONGRESS FOR RATIFICATION, BY ITS TERMS THE PROPOSED TREATY CALLS FOR PRIOR APPROVAL OF EXPROPRIATION OF WORKS CREATED BY UNITED STATES CITIZENS

A statement opposing ratification and alternatively, a proposal to mitigate the economic losses of American Authors and Publishers in the event of ratification of Paris text of U.C.C.

In July 1971 diplomatic conferences held at Paris proposed revisions to the Universal and Berne Copyright Conventions. These revisions were principally designed to reduce the costs to developing countries of using intellectual property created by authors and publishers in the developed countries. The Paris text of the Universal Copyright Convention will be submitted shortly to the United States Senate. Ratification of this treaty by the Senate would reduce the protection available to American authors and publishers under both the Berne and Universal Conventions, and would constitute formal approval by the Senate of the expropriation of the private property of Amercian citizens without adequate compensation.

Despite the legitimate needs of underdeveloped countries for machinery, equipment and food, none of these goods and products are given to foreign countries by the United States simply by consenting in a treaty to the taking of these items without payment to the American owners of the property. It is not conceivable that intellectual property created and produced by American citizens would be treated by the Congress of the United States as less valuable. We urge therefore that the Senate not approve the Paris revision of the Universal Copyright Convention.

If, however, the Senate feels that the national interest of the United States in promoting the welfare of the developing countries requires ratification, the Federal Government should provide compensation to the authors and publishers adversely affected by such revision, following the precedent established in the Trade Expansion Act of 1962 and other legislation. After discussing the relevant provisions of the Paris Revisions, there is set forth the pertinent features and legislative history of the Trade Expansion Act.

1. SUMMARY OF THE MAJOR EFFECTS OF THE PARIS REVISIONS ON THE RIGHTS OF AUTHORS AND PUBLISHERS (IN PARTICULAR OF EDUCATIONAL MATERIALS)[1]

The Universal and Berne Copyright Conventions are the two treaties which provide international protection for the rights of authors, publishers and other copyright owners, in their books and other writings, their audio-visual works, and their other intellectual property in all media. The United States is a member of only the Universal Copyright Convention, and therefore only the revision of that treaty is formally before the Senate. However, American ratification of that revision will also render effective the Paris revisions of the Berne Convention.

Publishing and other means of dissemination of intellectual property are of multi-national scope today, and it is common for works to be published simultaneously in the United States and abroad. American authors and other creators of intellectual works thereby obtain the protection of the Berne Convention. Recognizing this fact, the Paris revision of the *Berne* Convention provides that it will not go into effect unless and until the United States, the United Kingdom, France and Spain ratify the Paris revision of the *Universal* Copyright Convention.

This provision also explains why the Paris sessions which produced the revisions of both treaties were conducted concurrently and the substantive provisions of the revisions of both texts are almost identical, insofar as they concern developing countries. Thus, the United States' decision upon ratification of the Paris revision of the Universal Copyright Convention is inextricably intertwined with the same revision of the Berne Convention, and the effects on both treaties must be considered together.

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[1] A more detailed statement of the provisions of the Paris revisions is attached as Annex A, together iwth columar comparisons with the existing Berne Conventions and the Stockholm Protocol.

The foreign market and the involvement therein of American educational publishers has increased markedly during the last decade and there is every evidence that the American publishing industry is not only exporting more works but is investing in foreign publishing. While the concessions of the Paris revision run in favor only of "developing countries", that term is so undefined as to allow over 80 countries, including some in Europe, to qualify. Virtually every country outside North America and Europe, save only Australia, New Zealand, and Japan, could be considered "developing".

The concessions granted to the "developing countries" primarily deal with the rights to translate and reproduce for educational purposes. But the scope of such purposes, as is shown below, is so broad that far more than textbooks, reference works and the usual instructional audio-visual materials may be covered; the term may be deemed to include, in practice, virtually any work so long as its use is in any way related to any form of instruction, scholarship, or research. For the authors and publishers of educational materials, the "educational" exemptions eliminate over 80 countries from their market.

A. The Compulsory Translation and Reproduction Licenses

The most important provisions of the Paris revisions allow developing countries to grant licenses without permission of the copyright owners for the translation and reproduction of works within a short time after their publication. The revisions state that the copyright owners shall be paid a "just compensation consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned," but this is likely to prove an empty formula.

Under the terms of the Paris revisions, and by the very nature of such licenses, they are likely to be granted only after the copyright owners have already rejected as inadequate the royalties and other licensing terms proposed by the users in the developing country; the new terms are likely to be even more exiguous. Furthermore, by the very nature of the class of developing countries, there will likely not be sufficient bilateral relations to establish royalty standards with any definiteness, and particularly not for the newer forms of educational materials, especially audio-visual works. The "consistency" to be expected under the Paris standard will therefore be far below the reasonable minimal expectations of authors and publishers. Moreover, the standard will be policed only by the national tribunals of the respective developing countries. In sum, adequacy of compensation appears to be left, in actuality, to the developing country's own judgment as to what amount is "just".

The *compulsory* translation license applies to translations into any language "in general use" in a developing country. It may be granted within a short period after first publication of the original work, if a translation into the national language has not been published or is out of print. For translations into a language not in general use in any developed country which is a member of the particular Convention, the period is one year. If the language is in general use in such a developed country, the relevant period is three years; but for languages other than English, French and Spanish, the period can be reduced by agreement with the developed country where the language is in general use (e.g., Brazil and Portugal agreeing to reduce the period for Portuguese one year). Under the existing Berne Conventions, any country may reserve the right to make translations into its national languages without compensation, but only beginning ten years after publication and only if no such translation has been published in any member of the Convention. Under the existing Universal Copyright Convention, a member country can grant compulsory licenses for translation into its national languages beginning seven years after publication of the original work, if the work has not been translated into such languages or if the translations are out of print.

The compulsory reproduction license of the Paris revisions becomes available a stated number of years after the first publication of a work, as described below, if copies have not been distributed or have not been on sale for six months in the licensing State "at a price reasonably related to that normally charged in that State for comparable works." Where the publication of such works is subsidized in any way by a developing State, it will, of course, be impossible for American publishers to make copies of their own works available at such prices. The stated periods are three years for works of science, mathematics and technology; seven years for works of fiction, poetry, drama and music; and five years for other works.

It has frequently been asserted that compulsory licensing under the Paris revisions will be the exception rather than the rule. The hard fight waged by the developing countries to obtain the compulsory licensing system, however, indicates that they themselves expect to make substantial use of the system. The effect will be both to deprive American authors of compensation and to exclude American publishers from serving developing countries by any means, including direct sales or by foreign publishing affiliates.

B. *The Vague Definition of "Developing Countries"*

The Paris revisions, as we have noted above, contain no objective criteria of what constitutes a "developing country", nor are there any viable standards relating the class of countries entitled to invoke the special concessions to the ends sought to be served by the concessions. A developing country is defined simply as one which is "regarded as a developing country in conformity with the established practice" of the General Assembly of the United Nations. Although the reference to the "established practice" of the United Nations may be considered to mandate some reference to its practice in the selection of countries entitled to reduced levels of contributions to U.N. upkeep (based principally on per capita income statistics) or in granting economic assistance, it is generally understood that these "standards" fluctuate widely and may turn upon factors—political, historical or even economic—having little relevance to the legitimate need of any country for the reservations established by the Paris revisions. There is no central arbiter nor list of "developing countries" and, in the final analysis, it seems clear that each country adhering to the revised Convention is able to determine for itself whether it may invoke the compulsory licensing provisions. It is clear, further, that a great many countries in South and Central America, Asia, Africa, the Middle East and even parts of Europe will be able to claim the benefits of these provisions with sufficient credibility under the Convention standard to avoid the appearance of an outright rejection of its Convention obligations.

It is not without significance that those countries seeking special concessions at the Paris conferences steadfastly refused to admit any objective criteria of the status of a country's development for the purposes of the revisions, and that the opinion of the General Rapporteur of the U.C.C. "Concerning the Criteria Governing 'Developing Countries'" is contained in a document which states the opinion to be "purely personal . . . [and] although . . . based in part on the discussion of the question during the Paris Conference, [one which] cannot in any way be regarded as reflecting the views of other delegates or as constituting a part of the General Report of the Conference."

The inadequacy of the definition of a "developing country" as expressed in the Paris revisions is apparent not only at the stage at which a country may invoke the special reservations on the rights of translation or reproduction, but also at the stage at which it may no longer do so—i.e., when it "ceases to be regarded" as a developing country. The inadequacy of the notion of a "developing country" in the Paris revisions not only allows an enormous number of countries at various stages of development to grant compulsory licenses, but also allows them to continue doing so as their states of development improve, virtually without limit. The only cutoff point stated in the Paris revisions is the point at which a country "ceases to be regarded" as a developing country, a phrase for which there are no more objective criteria than there are for the definition of "developing countries" discussed above. Thus, any country initially taking the benefit of the compulsory licenses may well continue to grant such licenses after having achieved a stage of development sufficient to enable it to deal with the property of others on a level expected of other Convention countries.

C. *The "Educational" Limitation*

The compulsory license provisions available to developing countries under the Paris revisions are, as has been repeatedly pointed out by proponents of ratification, circumscribed by reference to "educational" limitations on the scope of the license. Thus, compulsory translation licenses may only be granted for the purposes of "teaching, scholarship or research", while compulsory reproduction licenses (and translation licenses for non-broadcast use of audio-visual text) are limited to use in connection with "systematic instructional activities". In some cases, such limitations serve also to describe the class of works subject to compulsory licensing—thus, only audio-visual works "prepared and published for the sole purpose of being used in connection with systematic instructional activities" are subject to such licenses. In a similar vein, both broadcasts utilizing compulsory licensed translations and the permitted export of such translations under certain conditions are to be devoid of commercial purpose.

For authors and publishers of educational materials, since it is addressed to eliminate their entire market, such limitations obviously provide no comfort, and their significance is a negative one. They only serve to underscore a basic point of these comments—that a particular segment of American enterprise is being asked (required might be a better word) to devote the product of its private initiative to the subsidization of the development of foreign countries in a manner thoroughly inconsistent with our traditional concepts of property and of individual vs. governmental responsibility.

Assuming that some American authors and publishers do find initial comfort in the educational limitations on compulsory licensing under the Paris text, either as a device for inexulating them from the effect of such licensing or as a theoretically satisfactory justification for the need for such reservation, they would do well to consider how little actual limitation these standards impose. The Report of the General Rapporteur for the Paris U.C.C. Conference notes the "understanding" that "scholarship" encompasses not only instruction at grade and high schools, colleges and universities, but also a "wide range of organized educational activities intended for participation at any age level and devoted to the study of any subject" and that "systematic instructional activities" include "not only activities connected with the formal and informal curriculum of an educational institution, but also systematic out-of-school education." The Report also notes that the possibility of the general public sale of copies produced under compulsory licensing was "envisaged" at the Conference. The only palliative offered for this possibility is that the licensing authority of the State would be "under a duty to determine that the License would fulfil the need of specified 'systematic instructional activities' [and the license] would necessarily be refused if such activities were in fact incidental to the actual purpose of the reproduction." Observers at the Paris Conference were left with but little doubt that, as we have indicated above, the countries seeking the benefit of these reservations have a rather fluid and wide-ranging conception of "scholarship", "education", and the other "limitative" criteria.

D. Reproduction under Compulsory Licenses outside the Developing Countries

The Paris revisions provide that compulsory licenses are "valid only for publication" in the territory of the licensing State, but the discussion at the Paris conference made abundantly clear, as confirmed by governing interpretations in the Report of the General Rapporteurs, that works may be printed outside a developing country pursuant to its compulsory license, and joint translation facilities may be employed by several countries under their compulsory licenses. This interpretation imposes only the following restrictions of substance on foreign reproduction of compulsory licensed works:

1. The reproduction facilities in the developing country are "incapable for economic or practical reasons" of reproducing the copies (a standard to be interpreted by the developing country itself);
2. The country of reproduction is a Berne or U.C.C. member;
3. All copies reproduced abroad are delivered to the licensee in bulk for distribution only in the developing country;
4. The reproduction facility is not "specially created" for reproduction under compulsory licenses. The interpretation also provides that compulsory licensees may employ translators and editorial personnel in other countries, and that several compulsory licensees from different countries may use the same translation; and
5. The reproducing facility guarantees that the work of reproduction is lawful in its own country.

To illustrate the result—half a dozen or more developing countries may utilize the same editorial, translation and printing facilities, located in any Berne or U.C.C. country, to translate and/or reproduce a work to be used pursuant to the compulsory license provisions of each country. These joint printing facilities need not even be in a developing country. Given the additional right of a joint translation, this in fact results in a publishing enterprise servicing a group of developing countries.

There is furthermore no requirement that these foreign translation, editorial, and printing operations must not be conducted for profit. In other words these may well be profit making publishing enterprises. The compulsory licenses will save them most of the initial costs and royalty expenses, which are among the heaviest expenses of any publishing enterprise. The net result will be to sanction profit-making publishing operations which will preempt markets from the authors and publishers for copyrighted materials.

The foregoing is a brief summary of the provisions of most interest to educational authors and publishers. Attached as Annex A is a chart that summarizes in parallel columns the major substantive provisions dealing with translation, reproduction and other rights under the existing Berne Convention and the Stockholm Protocol and the Paris revision of that Convention.

Since the concessions to developing countries under the Paris revisions of the Universal and Berne Conventions are substantially the same, a general summary of the concessions made by the Paris revision of the Universal Convention is reflected in the columnar presentation of the Paris revisions to the Berne Conventions. Such significant differences as exist are set forth in footnotes to the chart.

The view has been expressed that the Paris revision of the Berne Convention is a substantial improvement over the Stockholm Protocol to that Convention. The Stockholm Protocol, which only five years ago created such a furor, has not been adopted by the developed countries, because of its broad preemption of the rights of authors and publishers. For authors and publishers of educational materials, however, broad or narrow that category may be, examination of the chart attached an Annex A will show that the Paris revision can hardly be deemed a meaningful improvement for them over the Stockholm Protocol. The changes in the compulsory license scheme have been largely procedural, and promise no substantive relief of any importance. Regardless of the more circuitous formalities, required, the result for educational authors and publishers would be the same—expropriation.

2. THE PROPRIETY OF AND PRECEDENT FOR GOVERNMENTAL COMPENSATION IF THE PARIS REVISION IS RATIFIED

For the reasons above, we urge that the Paris Revision of the Universal Copyright Convention should not be ratified. However, if the Senate deems that the underlying national interests of the United States require such ratification, notwithstanding the injury to some of its citizens, we suggest that provision be made for governmental compensation to those authors and publishers whose interests would be sacrificed.

United States economic assistance to developing countries has always heretofore been a governmental responsibility, discharged by money payments or loans to developing countries or by governmental purchases of needed materials which were then supplied directly to the foreign countries. If in this case the United States Government feels it cannot take that course with respect to intellectual property, and that economic assistance with respect to such property must become an individual responsibility of a class of American citizens, then governmental action to compensate American authors and publishers for this burden is appropriate. The Senate, and the United States Government in general, has a history of carefully guarding the rights of United States citizens where the national interest requires that some private interests of some citizens be sacrificed in order to make concessions to foreign countries. The outstanding example is the adjustment assistance provisions of the Trade Expansion Act of 1962.

The Trade Expansion Act liberalized United States tariff provisions so as to make possible what later became known as the Kennedy Round of tariff reductions. When the Act was proposed and enacted, it was recognized by all concerned that some firms and workers would be seriously injured by the increase in imports which the contemplated tariff reductions would allow. Accordingly, the Act included provisions under which injured firms could receive assistance consisting of technical assistance, government loan guarantees, and tax assistance, and affected workers could receive assistance consisting of a form of unemployment compensation, training for other jobs, and relocation allowances.

These forms of assistance are paid by the Federal Government and at levels which are uniform throughout the nation.

The legislative history of the Act makes clear that these provisions embody a broad general principle. The initial form of the Act was drafted by the Kennedy Administration and introduced in the House as H.R. 9900 of the 87th Congress. The President's message, dated January 25, 1962, accompanying the bill stated in part:

"When considerations of national policy make it desirable to avoid higher tariffs, those injured by that competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the Federal Government.

* * * * * * *

"Just as the Federal Government has assisted in personal readjustments made necessary by military service, just as the Federal Government met its obligation to assist industry in adjusting to war production and again to return to peacetime production, so there is an obligation to render assistance to those who suffer as a result of national trade policy."

(H. Doc. #314, 87th Cong. 2d Sess., reprinted in H.R. Ways and Means Comm., 90th Cong., 1st Sess., "Legislative History of H.R. 11970, 87th Cong., Trade Expansion Act of 1962" (1967), at pp. 90–91 (hereinafter cited as "Leg. Hist."))

Secretary of Commerce Luther Hodges made the principal presentation before the House Ways and Means Committee. Discussing relief for firms and workers injured by increased imports, he said:

"The Federal Government has a special responsibility to such firms and workers. For their hardship can be directly traced to a specific action undertaken by the Government for the good of all—the lowering of trade restrictions in order to open up new markets for our goods abroad. As the President has said, no industry or work force should be made a sacrificial victim for the benefit of the national welfare. No small group of firms and workers should be made to bear the full burden of the costs of a program whose great benefits enrich the Nation as a whole." (H.R. Ways and Means Committee, 87th Cong. 2d Sess., Hearings on H.R. 9900, p. 90; Leg. Hist. p. 172)

The Ways and Means Committee revised the administration's bill and reported out the revision as H.R. 11970. In its report, the Committee justified the adjustment assistance provisions in the following language:

"The furnishing of this assistance is fully consistent with our traditional practice of protecting American commerce and labor from serious injury resulting from imports. It will enable those firms and workers injured by increased imports to receive prompt help that is suited to their individual needs." (H. Rept. No. 1818, 87th Cong., 2d Sess., pp. 13–14; Leg. Hist., pp. 1077–78)

Representative Hale Boggs was the floor manager of the bill in the House. In his speech introducing the bill, he supported the adjustment assistance provision as follows:

"[I]t is based on a very sound fundamental principle: That in the pursuit of a national objective, we shall give assistance to the businessman who is hurt and give assistance to the workingman who is hurt. There is nothing new or radical about this. When we call a lad and say: You must go to serve your country in the Army or the Navy or the Air Force, we also say to him: Son, when you come back home, your job will be waiting for you. We assure him of reemployment rights. If he is hurt, we put him in a veterans' hospital.

"Throughout the entire history of the United States, we have consistently recognized the fact that in the pursuit of an overall national policy, we have made adjustments for those who are injured thereby—whether it be injury to firms or to workers. That is all this bill does—nothing else. In most instances, it will use existing machinery which has already been established by law." (Cong. Rec. 6/27/62, pp. 11,086–87; Leg. Hist. p. 1189)

Representative Keogh, another member of the Ways and Means Committee, subsequently remarked about these provisions:

"Having set up the fences which we now propose to lower or remove, we have the obligation—in equity and good conscience—to assist these affected firms and workers in meeting the new situation which the Government will permit to come about." (Cong. Rec. 6/27/62, p. 11,111, Leg. Hist. p. 1233)

Both in the House and in the Senate, objections were raised to the payment of a uniform amount to workers, rather than the amounts payable under state unemployment compensation systems, which in most cases were much less. In the

House, Representative Conte of Massachusetts argued that this was discriminatory and offered as a particular example unemployment in his home district caused by cancellation of a government contract. Representative Mills, then as now Chairman of the Ways and Means Committee, answered that in Conte's example the government was acting like any other contractor, and continued:

"Assistance in the case of removal of tariffs can be justified, because this condition arises through Government sovereign action, taken in the public interest, to lower tariffs and thereby take a job away from this man. The sovereign has seen fit to remove a tariff which it placed on an article to protect the job. In all equity and good conscience it must take steps to make the affected worker's adjustment to the new competitive conditions created by its own acts as easy as possible under the circumstances." (Cong. Rec. 6/27/72, p. 11,117; Leg. Hist. pp. 1243–44)

In the Senate, two amendments were offered with respect to the adjustment assistance provisions. The first sought to eliminate the provisions entirely. The asserted grounds were that the provisions discriminated against those unemployed for other reasons, that some of those others might have become unemployed because they had been providing goods and services to the industries forced out of business by imports, and that there was no essential difference between unemployment caused by imports and unemployment due to changes in government purchasing. (Remarks of Senator Curtis, Cong. Rec. 9/17/72, p. 18,688; Leg. Hist. pp. 1702–03) (Of course, the motive for the amendment was to eliminate labor support of the Act as a whole and thereby defeat the Act.)

Senator Williams of New Jersey opposed the amendment and defended the provisions in the bill as follows:

"I strongly support the President's trade program. I think it is vital to our Nation's continued growth and prosperity. But I see no reason why the few communities, industries or workers who may possibly suffer some adverse effect from the reduction of trade barriers must bear the entire burden. If the interests of the Nation and the interests of our national trade policy cause some injury, the Nation, and therefore the Federal Government have a clear and unmistakable obligation to alleviate that injury and facilitate adjustment to new economic activities." (Cong. Rec. 9/17/72, p. 18,691; Leg. Hist. p. 1706)

The first amendment was defeated, 58–23.

The second amendment was offered by Senator Byrd of Virginia. It would have set the level of payments at the rate prevailing under state unemployment compensation programs, rather than at the uniform national level set by the bill. The arguments in support of the amendment were similar to those for the previous amendment. In opposition to the amendment and in support of the pending bill were the following remarks:

Senator SMATHERS. "I, too, believe in States rights. I believe that if an injury done to a worker results from action taken by a State, the State, rather than the Federal Government, should provide the proper compensation.

But when this bill goes into effect, the injury will result from Federal action, from the action of the Federal Government in removing the tariff, thereby allowing the entrance of imports which will result in damage to an industry and in the loss of the jobs of the workers in that industry. In view of the fact that the action would be Federal action, those of us on the committee took the position that the Federal Government should have the responsibility for making the compensation payments due to the worker because he lost his job as a result of action taken by the Federal Government.

I believe that in this instance the Federal Government, acting in what I regard as the overall interest of the Nation—and I recognize that some workers will be injured thereby, but there will be overall benefit to American industry and to the general economy—has the responsibility, under the original concept, to provide funds for proper and necessary compensation." (Cong. Rec. 9/17/72, p. 18,694; Leg. Hist. p. 1712)

Senator LONG: "Mr. President, it is a fair proposal that Federal standards be used in paying for Federal injury, we provide private relief bills to compensate Federal injury all the time. If one examines the calendar, he will find more private relief bills than any other kind. This is a relief bill for those the Federal Government chooses to injure in the pursuance of a program in the overall national interest. On the whole, we anticipate an increase in national income as a result of the bill. We anticipate an increase in employment overall. We do not want to do that at the expense of a few and the suffering of an unfairness to a few Americans who will be injured." (Cong. Rec. 9/17/72, p. 18,695; Leg. Hist. p. 1714)

Senator MANSFIELD: "These import-affected workers would not be casualties of supply and demand or any other impersonal economic force. Instead, their unemployment would be directly attributable to a decision of the Federal Government taken in the national interest. Certainly, the Federal Government would owe a special obligation to those injured by such actions."

The amendment was defeated, 51–31. The principle was thereby affirmed that if the Federal Government causes injury to some industry in order to achieve some broad goal of foreign policy, it should compensate those who have been injured, at least in part.

Accordingly, it is urged that the precedent of the Trade Expansion Act be followed and that an appropriate enactment be promulgated to vitiate the economic damage upon authors and publishers if Congress should determine that it is in the national best interest to ratify the Paris text of the Universal Copyright Convention. If, as supporters of the Paris revisions have asserted, the compulsory licensing provisions will be little used by the developing countries, then the Senate will have affirmed, at little cost, the sound principle that a small class of citizens is not to be required to bear the burden of furthering the national interests without compensation. If, as we fear, compulsory licensing will become widespread among developing countries, then the injury to authors and publishers will be substantial in terms of the normal dimensions of the publishing industry, and there will be a serious need for compensation. Measured against the sums which the Congress usually appropriates in connection with foreign aid, however, the amount of compensation would in any event be negligible.

We suggest that provisions for such compensation would be simpler than those of the Trade Expansion Act because:

1. The Paris texts of both the U.C.C. and the Berne Union include procedures for notifications to the copyright owners or proprietors when a developing country grants a compulsory license on copyrights owned by United States citizens (as well as all other countries).

2. Under the Adjustment Assistance program of the Trade Expansion Act, one recurring problem which requires extensive investigations by the Tariff Commission is to determine whether injuries to particular American industries are caused by current tariff reductions or other factors, such as general business conditions, increasing American costs, prior tariff reductions, etc. Such problems are entirely absent here, where the loss of income to authors and publishers is demonstrated from the use of their literary property by a developing country (with little compensation or none) under compulsory licenses.

3. The uses made of educational materials in the developing countries can be measured. Royalties under compulsory licenses, regardless of their rates, will normally be measured by such uses, i.e., number of books, records, tapes, etc. sold, and such numbers should in the ordinary course be reported together with the royalty payments, or be obtained by inquiry from the licensees.

4. The measure of compensation that could be set forth in the statute would be a predetermined percentage of those royalties which publishers and authors charge in the normal course of export licenses.

Accordingly it is urged that the Paris Revision of the Universal Copyright Convention not be ratified. However, in the event that despite the unwarranted and unfair distinction made between tangible property and intellectual property Congress decides that it is in the national interest to ratify the treaty, then it is urged that an enactment paralleling the Adjusment Assistance provisions of the Trade Expansion Act be passed to preserve the rights of authors and publishers in conformity with the traditions of the United States.

B. L. LINDEN.

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*

ANNEX A

CHART I.—TRANSLATION RIGHTS

[*The following tabular summary of the "Paris Revision" relates to the Paris Revision of the Berne Convention. Substantial differences between this Revision and the Paris Revision of the Universal Copyright Convention are indicated by asterisks and explained by "Notes" appearing at the conclusion of the tables. Where no note is indicated, the summary of the Paris Revision serves as a summary of the concessions made to developing countries in the Universal Copyright Convention]

Existing Berne Conventions (Rome 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
NO CONCESSIONS Despite Convention recognition of exclusive translation rights, any country may reserve the right to allow translation of Works into its national languages without authorization or compensation if, after ten years from first publication of the original Work, an authorized translation into such language has not been published in a Union country. Other Convention countries may not retaliate against Works emanating from a country making this reservation. [Art. 25(3).]	A developing country may reserve the right to allow translation of Works without authorization or compensation if, after ten years from first publication of the original Work, an authorized translation has not been published in a Union country in the language for which protection is claimed. Developed countries may not retaliate against Works emanating from a developing country making this reservation. [Protocol, Art. I(b)(i).] (A developed country making such a reservation under Stockholm is subject to retaliation [Text, Art. 30(2)(b)].)	Same as Stockholm Protocol with respect to translation into languages "in general use" in the developing country. [Appendix, Arts. V(1)(a), I(6)(b); Text, Art. 30(2).] (See note 1.)
NO COMPULSORY LICENSE	In addition to allowing free translation ten years after first publication, a developing country may subject the right of translation to compulsory licensing. [Protocol, Art. I(b)(i)(ii).]	As an alternative to allowing free translation ten years after first publication, a developing country may subject the right of translation to compulsory licensing [Appendix, Art. II, V(1)(c), V(2), I(1)].** (See note 1.)
	The system of compulsory licensing allows the "competent authority" (not defined) of a developing country to authorize the translation of Works, and the publication of the translation, without the authority of the owner of translation rights, on certain terms and conditions. [Protocol, Art. I(b)(ii).]	The system of compulsory licensing allows the "competent authority" (not defined) to authorize the translation of Works, and the publication of the translation in printed or analagous forms of reproduction, without the authority of the owner of translation rights, on certain terms and conditions. [Appendix, Art. II(1), II(2)(A)]. In the case of certain audio-visual Works, the license extends to publication of the translation in audio-visual form. [Appendix Art. III(7)(6).]
	All books, audio-visual Works, and other Works are subject to compulsory translation license. [Protocol Art. I(b); Text, Art. II.] No special provision is made concerning application of the compulsory license to the textual portions of audio-visual Works.	All Works "published in printed or analagous forms of reproudction" are subject to compulsory translation licensing. [Appendix, Art. II(1)]. The textual portions of audio-visual Works which were "prepared and published for the sole purpose of being used in connection with systematic instructional activities" are subject to a compulsory translation license. [Appendix, Art. II(9)(c), III(7)(b).] (The rules governing translation of the textual portions of audio-visual Works differ from those governing printed Works. In the former case, the rules follow those pertaining to the compulsory reproduction license under the Paris Revision.)
	A compulsory translation license may be granted without restriction as to purpose.	Printed Works: A compulsory license for translation of printed Works may be granted only for the purpose of "teaching, scholarship or research." (Appendix, Art. II(5).) A broadcasting organization headquartered in a developing country may secure a compulsory license to translate a printed Work if the translation is only for use in broadcasts (live or recorded) to recipients within the developing country, which broadcasts are intended exclusively for "teaching or the dissemination of the results of specialized technical or scientific research to experts in a particular profession"; and if "all uses made of the translation are without any commercial purpose." [Appendix, Art. II(9)(a)(b).]

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*—Continued

CHART I.—TRANSLATION RIGHTS—Continued

Existing Berne Conventions (Rome, 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
		(The compulsory translation license does not encompass the right to record or broadcast the translation. However, Convention recognition of the broadcasting right allows member countries to determine the conditions under which that right may exist, subject to compensation which may be fixed by the competent authority, and to "determine the regulations for ephemeral recordings" made by broadcast organizations. Text, Art. IIbis.) Audio-Visual Works (Prepared and Published Solely For Use in Connection with Systematic Instruction): Broadcasters may secure a compulsory license to translate the textual portions of such Works for the same purposes as noted in connection with their translation of printed Works. [Appendix, Art. II(9)(c).] In other cases, a compulsory license for translation of the textual portions of such Works may be granted only for "use in connection with systematic instructional activities" [Appendix, Art. III(7)(b), III(1).]
	The compulsory translation license may only be granted for translation into a "national, official, or regional language" of the licensing State. [Protocol, Art. I(b)-(iii).]	The compulsory translation license may only be granted for translation into a language "in general use" in the licensing State. [Appendix, Art. II(2)(a), III(7)(b).]
	The compulsory translation license becomes available three years after first publication of the original work if a translation thereof has not then been published in the licensing State into a national, official or regional language of that State, or if all previous editions of a translation in such language in that State are then out of print. (The license will be available for translation into any of the national, official or regional languages into which the original Work had not been published or in which a translation is out of print.) [Protocol, Art. I (b)(ii).]	Printed Works: The compulsory translation license becomes available after a stated number of years from first publication of the original Work if a translation thereof has not then been publicized anywhere in the language concerned, or if all editions of a translation into such language are out of print. In the case of translations into a language not in general use in any developed Berne country the relevant period is one year. [Appendix, Art. II (3)(a), II(2)(a).] In the case of translations into a language in general use in any developed Berne country, the relevant period is three years. [Appendix, Art. II(2)(a).] (In the case of translations into languages other than English, French or Spanish, a lesser period may be substituted by agreement between the developing country and all developed Berne countries in which the language is in general use. Appendix, Art. II(3)(b).) Audio-Visual Works (Prepared and Published Solely For Use in Connection With Systematic Instruction): The compulsory translation license becomes available to broadcasters at the same times as govern printed Works. [Appendix, Art. II(9)(c)(d).] In other cases, a compulsory license for translation of the textual portions of such Works becomes available (in connection with a compulsory license to reproduce the Work) after a stated number of years from first publication of the Work if copies thereof have not then been distributed in the licensing State "at a price reasonably related to that normally charged in [that] country for comparable works," or no copies have been on sale for six months in that State at "reasonably related" prices. [Appendix, Art. III(7)(b), III(2)(a)(b).] The relevant period is: three years for Works in the area of science, mathematics and technology; seven years for Works of fiction, poetry, drama and music; five years in other cases. [Appendix, Art. III(7)(b), III(3).]

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*—Continued

CHART II.—REPRODUCTION RIGHTS

Existing Berne Conventions (Rome, 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
	An applicant for a compulsory translation license must, "in accordance with the procedure" of the licensing State, establish either: (1) "That he has requested, and been denied, authorization" by the owner of the translation right [Protocol, Art. I(b)(ii)];	An applicant for a compulsory translation license must, "in accordance with the procedure" of the licensing State, establish either: (1) "That he has requested, and been denied, authorization" by the owner of the translation right [Appendix, Art. IV(1)]. In this case: At the time of making his request, the applicant "shall inform" an information center designated by the publisher's country. [Appendix, Art. IV(1)]; and The license may not be granted until after the expiration of varying monthly grace periods from the applicant's compliance with the foregoing. If, during these grace periods, the owner publishes a translation anywhere into the relevant language (or, in the case of audio-visual works, causes their distribution at "reasonably related" prices in the licensing State), the license may not be granted. [Appendix, Art. II(4)(a)(i), II(4)(b), III(7)(b), III(4)(a)(i), III(4)(c).]
	Or— (2) "That, after due diligence on his part, he was unable to find the owner of the right." [Protocol, Art. I(b)(ii)]. In this case: The applicant must send copies of his application to the publisher of the Work and a representative of the country of the country of the owner [Protocol, Art. I(b)-(iii)]; and The license may not be granted until after the expiration of two months from the dispatch of copies of the application [Protocol, Art. I(b)(iii)].	Or— (2) "That, after due diligence on his part, he was unable to find the owner of the right." [Appendix, Art. IV(1)]. In this case: The applicant must send copies of his application by registered airmail to the publisher of the Work and an information center designated by the publisher's country [Appendix, Art. IV(2)]; and The license may not be granted until after the expiration of varying grace periods from the dispatch of copies of the application. If, during these grace periods, the owner publishes a translation anywhere into the relevant language (or, in the case of audio-visual Works, causes their distribution at "reasonably related" prices in the licensing State), the license may not be granted. [Appendix, Art. II(4)(a)(2), II(4)(b), III(7)-(6), III(4)(a)(ii), III(4)(b), III(4)(c).]
	Developing countries establishing a system of compulsory translation licenses must make "due provision" to assure: (1) a "correct translation" [Protocol, Art. I (b)(iv)]; and (2) a "just compensation" [Id.] Payment and transmittal of compensation is "subject to national currency regulations." [Protocol, Art. I(b) (iv).]	Developing countries establishing a system of compulsory translation licenses must make "due provision" to assure: (1) a "correct translation" [Appendix, Art. IV (6)(b)]; and (2) a "just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned." [Appendix, Art. IV(6) (a) (i).] If national currency regulations hinder payment and transmittal of compensation, the "competent authority" shall use "all efforts" to ensure transmittal in internationally convertible currency. [Appendix, Art. IV(6)(a)(ii).]
	The obligation to pay compensation under a compulsory translation license terminates after ten years from first publication of the original Work. If an authorized translation has not yet been published into the language in question in a Berne country. [Protocol, Art. I(b)(viii).]	
	A compulsory translation license is generally "valid only for publication in the territory of" the licensing State. [Protocol, Art. I(b)(v).]	A compulsory translation license generally "does not extend to the export of copies" and is "valid only for publication" in the territory of the licensing State.] [Appendix Art. IV(4)(a).] [Copies published under a compulsory translation must bear a notice that the copies are available only for distribution in the licensing State. [Appendix, Art. IV(5).] (But the opportunity to engage in joint translation and reproduction abroad substantially equals the consequences of permitted export. See Chart I, p. 8.)

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*—Continued

CHART II.—REPRODUCTION RIGHTS—Continued

Existing Berne Conventions (Rome, 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
	However, copies may be imported and sold in other countries allowing such importation and sale. [Protocol, Art. I(b)(v) (effect of next-to-final sentence as negating conditions of prior sentence).]	However, in the case of translations into languages other than English, French or Spanish a public entity of the licensing State may export copies made under a compulsory translation license to its nationals in other countries, provided the copies are used "only for the purpose of teaching, scholarship or research", the export and distribution of the copies is "without commercial purpose", and the receiving country has agreed to the importation. [Appendix, Art. IV(4)(c).] This permissible export is not applicable to audio-visual works. [See, Appendix, Art IV(4)(c) and Art. III(7)(b).]
	Copies made under a compulsory translation license may be reproduced outside of the territory of the licensing State. [See Report, Main Committee II (Stockholm) par. 14.]	Copies made under a compulsory translation license may be reproduced in printed form outside of the territory of the licensing State if the licensing State has no reproduction facilities (or its facilities are "incapable" of reproducing the copies), all copies are returned in bulk to the licensing State, and the reproducer guarantees that the work of reproduction is lawful in its country. [General Report on the Paris Conference (Berne) par. 40.] Such reproduction may only take place in a Berne or Universal Copyright Convention country, and may not be done by a reproduction facility "specifically created" for compulsory licensing purposes. [Id.] The incorporation of compulsory-translated audio-visual texts into audio-visual Works may be done outside the territory of the licensing State under the same conditions. [Id. at par. 41 (a).] Compulsory licensees may employ translators and persons doing preliminary editorial work in other countries. [General Report par. 42.] A number of compulsory licensees may use the same unpublished translation [Id.].
	Compulsory translation licenses terminate if an authorized translation into the language in question is published in the licensing State within ten years from first publication of the underlying Work. [Protocol, Art.I(b)(vii).] Copies made before termination may continue to be sold. [Id.]	Compulsory translation licenses terminate if an authorized translation into the language in question is published at a price reasonably related to that normally charged in the licensing State for comparable Works. [Appendix, Art. II(6).] Copies made before termination may continue to be distributed "until their stock is exhausted." [Id.]
NO CONCESSIONS		
The Rome and Brussels Acts do not expressly recognize a general right of reproduction. Whether such a right is implicit in these Acts has been a matter of academic discussion.	The Stockholm Text expressly accords authors the exclusive right of reproducing (and recording) their Works. [Text, Art. 9.]	Same as Stockholm.* (See note 2.)
	The Stockholm text does allow members to permit reproduction in "certain special cases," provided that such reproduction "does not conflict with normal exploitation of the Work and does not prejudice the legitimate interests of the author." [Id.] It is believed that these conditions avoid the reproduction right being subject to general systems of compulsory licensing, except as permitted to developing countries.	Same as Stockholm.** (See note 2.)
NO COMPULSORY LICENSE	A developing country may subject the right of reproduction to compulsory licensing. [Protocol, Art. I(c).]	Same as Stockholm [Appendix, Art. III(1)].
	The system of compulsory licensing allows the "competent authority" (not defined) of a developing country to authorize the reproduction and publication of	The system of compulsory licensing allows the "competent authority" (not defined) of a developing country to authorize the reproduction of Works, and the publication thereof

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*—Continued

CHART II.—REPRODUCTION RIGHTS—Continued

Existing Berne Conventions (Rome, 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
	Works without the authority of the owner of reproduction rights, on certain terms and conditions. [Protocol, Art. I(c).]	at prices reasonably related to those normally charged in the licensing State for comparable Works, without the authority of the owner of reproduction rights, on certain terms and conditions. [Appendix, Art. III (1)(2)(a).]
	All Works are subject to compulsory reproduction licensing. [Protocol, Art. I (c)(i); Text, Art. II]. No special provision is made concerning application of the compulsory license to audio-visual Works.	All Works published in "printed or analogous forms of reproduction" are subject to compulsory reproduction licensing. [Appendix, Art. III(7)(a).] Audio-visual Works which were "prepared and published for the sole purpose of being used in connection with systematic instructional activities" may be reproduced in audio-visual form, and the textual portions thereof may be translated into a language in general use in the licensing State, under the compulsory reproduction license. [Appendix Art. III(7)(b).] Translations which are not in a language in general use in the licensing State, or which were produced without the authority of the owner of the underlying Work (including compulsory licensed translations) are not subject to compulsory reproduction licensing.
	A compulsory reproduction may only be obtained to reproduce and publish "for educational or cultural purposes." [Protocol, Art. I (c)(i).]	A compulsory reproduction license may only be obtained to reproduce and publish the Work "for use in connection with systematic instructional activities." [Appendix, Art. III (2)(a).]* (See note 3.)
	The compulsory reproduction license becomes available three years after first publication of a Work if it has not then been published in the licensing State, or if all previous editions in the licensing State are out of print. [Protocol, Art. I(c)(i).]	The compulsory reproduction license becomes available after a stated number of years from first publication of a Work if copies thereof have not then been distributed in the licensing State "at a price reasonably related to that normally charged in that State for comparable Works," or no copies have been on sale for six months in that State at "reasonably related" prices. [Appendix, Art. III(2).] The relevant period is: three years for Works in the area of science, mathematics and technology; seven years for Works of fiction, poetry, drama and music; five years in other cases. [Appendix, Art. III(3).]
	An applicant for a compulsory reproduction license must, "in accordance with the procedure" of the licensing State, establish either: (1) "That he has requested, and been denied, authorization" by the owner of the reproduction right [Protocol, Art. I(c)(i)];	An applicant for a compulsory translation license must, "in accordance with the procedure" of the licensing State, establish either: (1) "That he has requested, and been denied, authorization" by the owner of the reproduction right [Appendix, Art. IV (1)]. In this case: At the time of making his request, the applicant "shall inform" an information center designated by the publisher's country. [Appendix, Art. IV(1)]; and Licenses obtainable after three years may not be granted until after the expiration of a six-month grace period from the applicant's compliance with the foregoing. If, during this grace period, the owner distributes his work at "reasonably related" prices in the licensing State, the license may not be granted. [Appendix, Art. III(4)(a)(i), III(4)(c).]
	Or (2) "That, after due diligence on his part, he was unable to find the owner of the right." [Protocol, Art. I(c)(i)]. In this case:	Or (2) "That, after due diligence on his part, he was unable to find the owner of the right." [Appendix, Art. IV(1)]. In this case.

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*—Continued

CHART II.—REPRODUCTION RIGHTS—Continued

Existing Berne Conventions (Rome, 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
	The applicant must send copies of his application to the publisher of the Work and a representative of the country of the owner [Protocol, Art. I(c)(ii)]; and	The applicant must send copies of his application by registered airmail to the publisher of the Work and an information center designated by the publisher's country [Appendix, Art. IV(2)]; and
	The license may not be granted until after the expiration of two months from the dispatch of copies of the application [Protocol, Art. I(c)(ii).]	The license may not be granted until after the expiration of varying grace periods from the dispatch of copies of the application. If, during this grace period, the owner distributes his work at "reasonably related" prices in the licensing State, the license may not be granted. [Appendix, Art. III(4)(a)(ii), III(4)(b), III(4)(c).]
	Developing countries establishing a system of compulsory reproduction licenses must make "due provision" to assure: (1) an "accurate reproduction" [Protocol, Art. I (c)(iii)]; and (2) a "just compensation" [Id.]	Developing countries establishing a system of compulsory translation licenses must make "due provision" to assure: (1) an "accurate reproduction" [Appendix, Art. IV (6)(b)]; and (2) a "just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned." [Appendix, Art. IV(6)(a)(i).]
	Payment and transmittal of compensation is "subject to national currency regulations." [Protocol, Art. I(c)(iii).]	If national currency regulations hinder payment and transmittal of compensation the "competent authority" shall use "all efforts "to ensure transmittal in internationally convertible currency. [Appendix, Art. IV(6)(a)(ii).]
	A compulsory reproduction license is generally "valid only for publication in the territory of" the licensing State. (Protocol, Art. I(c)(iv).]	A compulsory reproduction license generally "does not extend to the export of copies" and is "valid only for publication" in the territory of the licensing State [Appendix, Art. IV(4)(a).] [Copies published under a compulsory translation must bear a notice that the copies are available only for distribution in the licensing State. Appendix, Art. IV(5).]
	However, copies may be imported and sold in other countries allowing such importation and sale. [Protocol, Art. I(c)(iv) (effect of next-to-final sentence as negating conditions of prior sentence).]	(But the opportunity to engage in joint translation and reproduction abroad substantially equals the consequences of permitted export. See II pg. 5).
	Copies made under a compulsory reproduction license may be manufactured outside of the territory of the licensing State. See Report, Main Committee II (Stockholm) par. 14.]	Copies made under a compulsory reproduction license may be reproduced in printed form outside the territory of the licensing State if the licensing State has no reproduction facilities (or its facilities are "incapable" of reproducing the copies) all copies are returned in bulk to the licensing State, and the reproducer guarantees that the Work of reproduction is lawful in its country. [General Report on the Paris Conference (Berne) par. 40.]
		Such reproduction may only take place in a Berne or Universal Copyright Convention country, and may not be done by a reproduction facility "specifically created" for compulsory licensing purposes. [Id.]
		Although the "incorporation of compulsory-translated audio-visual texts into audio-visual Works" may be done outside the territory of the licensing State under the the same conditions, these provisions may not apply to all aspects of the reproduction in audio-visual form of the audio-visual work itself. [See Id. at par. 41(a), par. 40.]
		Compulsory licensees may employ persons doing preliminary editorial work in other countries. [General Report par. 42.].

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*—Continued

CHART II.—REPRODUCTION RIGHTS—Continued

Existing Berne Conventions (Rome, 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
	Compulsory reproduction licenses terminate if authorized copies of the Work are published in the licensing State. [Protocol, Art. I(c)(vi).]	Compulsory reproduction licenses terminate if authorized copies of the Work are distributed in the licensing State at a price reasonably related to that normally charged in that State for comparable Works. [Appendix, Art. III(6).]
	Copies made before termination may continue to be sold. [Id.]	Copies made before termination may continue to be distributed "until their stock is exhausted." [Id.]

CHART III.—OTHER RESERVATIONS

A—BROADCASTING RIGHTS

Article 11 bis of the Rome Convention guarantees the exclusive right of broadcasting. However, all member states are permitted to "regulate" this, right, subject to the author's receiving "an equitable remuneration" which may be fixed by the "competent authority" absent agreement. Article 11 bis of the Brussels Convention extends this right to include communication of the original broadcast to the public by re-broadcast, wire, loudspeaker or other transmission. All member states are permitted to regulate these rights subject to the same condition of remuneration.	Developed countries are bound by the substance of Art. 11 bis of the Brussels text.	Same as Stockholdm.* (See note 4.)
NO CONCESSIONS	Developing countries may restrict the right of communicating the broadcast to the public to those communications "made for profit-making purposes." Developing countries may further regulate this right subject to the condition of remuneration. [Protocol, Art.I(d).]	No comparable provision.

B—DURATION OF PROTECTION

NO CONCESSIONS	[Protocol, Art. I(a).] Developing countries may limit the general duration of protection to the life of the author and not less than twenty-five years after his death; and the duration of protection of cinematographic, anonymous or pseudonymous works to not less than twenty-five years after it has been made available to the public. [Developed countries are bound to fifty year terms n each case. Text, Art. 7(1) (3).] Developing countries may limit the term of protection of photographic Works and Works of applied art to not less than ten years from the making of such Works. [Developed countries are bound to protect such works for not less than twenty-five years from their making. Text, Art. 7(4).]	No comparable provision.

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION*—Continued

C—GENERAL RESERVATION

Existing Berne Conventions (Rome, 1928 and Brussels, 1948)	Stockholm protocol (1967)	Berne Paris Revision (1971)
NO CONCESSIONS	[Protocol, Art. 1(e).] Developing countries may restrict the protection of all rights in any Work, "exclusively for teaching, study and research in all fields of education." A developing country making such restriction must make "due provision" to assure a compensation which "conforms to standards of payment made to national authors." Payment and transmittal of such compensation is subject to national currency regulations. Copies published under such restrictions may be imported and sold for "teaching, study and research purposes" in other developing countries which have invoked these restrictions and do not prohibit such importation and sale. Importation into developed countries is prohibited without the agreement of the author or his successor.	Not set forth as separate provision; however, see Charts I and II for effect of similar concessions on the interests of authors and publishers of educational materials.

Note (1): Neither the existing (1952) Universal Copyright Convention nor the Paris Revision of that Convention permits free translation ten years after publication. Under Article V of both the existing Convention and the Paris Revision, all member countries may establish a system of compulsory licenses for the translation of works if, after the expiration of seven years from first publication, a translation has not been published in the "national language" of (1952 Convention), or a language "in general use in" (Paris revision) in, that State. The compensation due for compulsory licenses under Article V is to be "just and [in conformity with] international standards." Article V ter of the Paris Revision of the Universal Convention concedes to developing countries the right to exercise compulsory translation licensing after only one or three years from first publication, under conditions substantially identical to those of the Paris Revision of the Berne Convention.

Note (2): The existing U.C.C. does not specifically guarantee the exclusive right of reproduction. This matter is left to the generality of Article I that each contracting state "undertakes to provide for the adequate and effective protection of the rights of authors and . . . copyright proprietors . . . ." Article IV bis of the Paris Revision of the U.C.C. takes this matter somewhat forward as it provides that "the rights referred to in Article I shall include . . . the exclusive right to authorize reproduction by any means." However, the significance of this step is weakened by the succeeding provisions of Art. IV bis: "However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention . . . . Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection . . . ."

Note (3): Although the compulsory reproduction license of the Universal Copyright Convention specifically allows reproduction "in audio-visual form" in the case of audio-visual works, printed works produced under compulsory license would have to be reproduced "in tangible form . . . from which [they] can be read or otherwise visually perceived." (Definition of "Publication", Art. VI.) A corresponding limitation does not appear in the Berne Conventions and the precise meaning of "publication", particularly as regards reproduction in sound recorded form, is subject to variation among Union countries. (Compare the scope of the compulsory translation license under the Paris Revision of Berne, which refers to "publication in printed or analagous forms of reproduction" [Appendix, Art. I(b)(ii)], with that of the reproduction license, which refers only to "reproduction and publication" [Appendix, Art. I(c)]. "Reproduction" is defined in Art. 9 of the Paris Text of Berne as including "any sound or visual recording.")

Note (4): The existing U.C.C. does not specifically guarantee the exclusive right of broadcasting. This matter is left to the generality of Article I that each contracting state "undertakes to provide for the adequate and effective protection of the rights of authors and . . . copyright proprietors . . . ." Article IV bis of the Paris Revision of the U.C.C. takes this matter somewhat forward as it provides that "the rights referred to in Article I shall include . . . the exclusive right to authorize . . . broadcasting." However, the significance of this step is weakened by the succeeding provisions of Art. IV bis: "However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention. . . . Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection . . . ."

EXHIBIT B

DEPARTMENT OF STATE,
Washington, D.C., June 21, 1972.

HON. J. W. FULBRIGHT,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am replying to your letter of June 7 in which you inquire on behalf of Mr. Raymond C. Hagel, Chairman of the Board of Crowell.

Collier and MacMillan, Inc., about certain provisions contained in the Universal Copyright Convention (UCC) as revised at Paris in July 1971. Representative Fraser and Senator Case have also written us about Mr. Hagel's interest and I have sent them similar replies.

The Executive Branch of the Government, along with the Copyright Office, believes that ratification of the revised UCC is in the national interest. As we see it, there are two basic question involved in Mr. Hagel's letter and the legal presentation attached to it. The first is whether or not the U.S. should ratify the revised convention, and the other is whether authors and publishers should be compensated for any losses which might possibly occur under the provisions in the revised convention which establish procedures for the translation and reproduction of copyrighted works in developing countries.

I shall limit my comments to the first question. The second question raises the issue of domestic compensatory legislation and falls more within the Congress' area of competence than ours.

I have already stated that the Department supports ratification of the UCC. It is our considered opinion that the revised convention is essential to the maintenance of the international copyright system as we know it today. Indeed, we believe that in certain respects, it may strengthen international copyright protection. At the same time, it will provide concrete evidence of the concern of the United States for the legitimate needs of developing countries in the field of education.

I believe it would be helpful to provide you with some background on this matter. The revision of the UCC came about largely as a result of a crisis in international copyright protection which occurred in 1967. It was at this time that the Stockholm Protocol, to which Mr. Hagel refers in his letter, was appended to the Berne Copyright Convention as an integral part of that Convention. The Berne Convention is the other major international copyright convention. While the U.S. does not adhere to Berne, many countries belonging to the UCC also adhere to Berne and the two conventions are closely related.

The developed countries party to the Berne Convention found themselves unable to ratify the Stockholm Protocol. The developing countries, insisting that formal recognition of their special needs was essential, threatened to withdraw from Berne. Because of a special clause in the UCC, countries renouncing Berne could not rely on the UCC for protection in other UCC-Berne countries. The result of renunciation of Berne would have been the exodus of the developing countries from both major copyright conventions and a virtual collapse of the international copyright system as we know it today.

In the face of this situation, it was decided to revise both the Berne and Universal Copyright Conventions in such a way that both developed and developing countries could accept their terms. This was the compromise worked out in 1971 at the Diplomatic Conference. It was a compromise arrived at through careful and lengthy negotiations in which over 60 countries participated or had observer delegations, including virtually all the major developing and developed countries. It should be noted that the fundamental U.S. negotiating position was worked out prior to the Conference through numerous consultations with all the interested copyright groups in the United States. As a matter of fact, most of these same groups were represented on the U.S. Delegation to the Conference.

The compromise does not "permit unauthorized and unpaid use by 'developing' nations for 'educational' purposes," as Mr. Hagel states. Rather, the revised UCC provides for the issuance of compulsory licenses for the use of copyrighted materials for educational purposes when such materials are not made available by the copyright owners during varying time periods, and states that "due provision shall be made at the national level to ensure" that compulsory licenses provide for "just compensation that is consistent with standards of royalties normally operating in the two countries concerned."

The provision for compulsory licensing is by no means new, a provision for compulsory licensing for translation rights has been contained in the Universal Copyright Convention since its inception in 1955. As far as we are aware, not one country has exercised the right to a compulsory license under that provision. Rather, terms have been worked out between the parties involved without the need for recourse to the treaty. It is quite possible that this will occur under the revised treaty, should it go into force.

It is important to note that the developing countries have the option of not adhering to either the Universal Copyright Convention or the Berne Convention, should these conventions not prove satisfactory to them. In such a case, they would also have the option of adopting national legislation which would provide for the use of foreign works without any license or payment whatever or with compulsory licensing provisions that might prove far more onerous than those contained in the two revised conventions.

It is the State Department's belief that the revised UCC constitutes a fair and just compromise and that failure on the part of the U.S. to ratify the convention could presage a return to the previous state of chaos in the international copyright field. Such a result would, of course, be detrimental to all interests concerned and especially to U.S. authors and publishers whose works are so widely used throughout the world.

In recognition of this fact, the Association of American Publishers, along with many other major copyright groups, including the American Bar Association, have firmly endorsed U.S. ratification of the UCC.

I hope this information will aid you in responding to Mr. Hagel. I have also enclosed a chart prepared by the Copyright Office which compares the provisions for developing countries contained in the revised conventions to those contained in the Stockholm Protocol. I believe this study will be of interest to you and should be helpful if read in conjunction with the study prepared by Mr. Hagel's attorneys. Please do not hesitate to contact me if I can be of any further assistance.

Sincerely yours,

David M. Abshire,
Assistant Secretary for Congressional Relations.

Enclosures.

COLUMNAR COMPARISON OF SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES IN THE STOCKHOLM PROTOCOL AND THE PARIS REVISIONS (1971) OF THE U.C.C. AND BERNE CONVENTIONS

PART I.—CRITERIA; DURATION; TIME OF ELECTION

Stockholm protocol	Paris revision of the U.C.C.	Paris revision of Berne—appendix
Criteria: Art. 1, preamble: "regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations."	Art. Vbis (1): same as the Stockholm protocol.	Art. I(1): same as the Stockholm protocol; new member developing countries may invoke reservations.
Duration: 10-year initial period under art. 1, preamble, plus, under art. 3, right to extend period indefinitely until adherence to new act that prohibits reservations, but, under art. 4, cannot maintain reservations if no longer regarded as a developing country—notification by director general and reservations cease 6 years thereafter.	Art. Vbis (2) and (3): renewable 10-year periods until country becomes developed; cutoff point at end of current 10-year period or 3 years after country ceases to be a developing one, whichever expires later.	Art. I(2) and (3): same as U.C.C.; renewable 10-year periods until country becomes developed; cutoff point at end of current 10-year, period or 3 years after country ceases to be a developing one, whichever expires later.
Time of election: Art. 1, preamble: upon ratification or accession.	Art. Vbis (1): at the time of ratification, acceptance, or accession, or thereafter.	Art. I(1): same as U.C.C. at the time of ratification or accession, or at any time thereafter.

PART II.—TERM OF PROTECTION; GENERAL EXEMPTION FOR TEACHING, STUDY AND RESEARCH IN EDUCATION

Term of protection: Art. 7 of the convention as modified by art. 1(a) of the protocol: life plus 25 years, in general.	No special provision; under art. IV: life plus 25 years, in general	No special provision; governed by art. 7 of the convention: life plus 50 years, in general.
General education exemption: Art. 1(e): Broad reservation permitting limitations on any economic right of authors for purposes of "teaching, study and research" in all fields of education, subject to compensation that conforms to standards of payment for national authors.	Omitted completely	Omitted completely.

PART III: TRANSLATION RESERVATION

Art. 1(b): 3-year period for all languages; right ceases 10 years from 1st publication unless exercised; no purpose restriction; export permitted.	Art. V of the U.C.C., as modified by art. Vter: essentially 3½ years for "world languages" and 1¾ years for "nonworld languages"—pars. (1) and (2), all languages subject to "teaching, scholarship, or research" restriction—par. (3); export prohibited, subject to exception for copies sent to nationals in another country for teaching, scholarship, or research and with-	Art. II and IV: generally same as U.C.C.

COLUMNAR COMPARISON OF SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES IN THE STOCKHOLM PROTOCOL AND THE PARIS REVISIONS (1971) OF THE U.C.C. AND BERNE CONVENTIONS.—Continued

PART III: TRANSLATION RESERVATION—Continued

Stockholm protocol	Paris revision of the U.C.C.	Paris revision of Berne—appendix
	out commercial purpose (translations in English, French, and Spanish may not in any case be exported)—par. (4); prohibition on export also subject to exception where printing within licensing State not economically or practically feasible and under limitations regarding place of printing, whether printing lawful, and copies must be returned in bulk to the licensee.	
Note: Alternative to apply 10 year translation reservation based on Paris Act of 1896, subject to material reciprocity.		Note: Irrevocable choice between Art. II reservation and 10 year translation reservation based on Paris Act of 1896, with no material reciprocity; may elect latter when developed, subject to material reciprocity—art. V.
No statement required limiting distribution to licensing State; no copyright notice required.	Copies in all languages must bear statement that they are only available for distribution in State where license applies; retaining copyright notice must be given by licensee if original work bore U.C.C. notice—par. (4).	Same as U.C.C., except no copyright notice required.
"Just compensation" for licenses during 3- to 10-year period; no compensation after 10 years if author failed to publish translation.	"Just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the 2 countries concerned"—par. (5).	Same as U.C.C.
Assurance of payment and transmittal subject to national currency regulations.	Assurance of transmittal of payment; if national currency regulations intervene competent authority shall make all efforts by use of international machinery to insure payment in internationally convertible currency—par. (5).	Same as U.C.C.
Recapture exclusive right by publication of translation within 10 years of first publication.	Terminate Art. Vter license and foreclose further Art. Vter licenses if authorized translation in same language and with substantially the same content is published at a price reasonably related to that normally charged for comparable works—par. (6).	Recapture exclusive right at any time if authorized translation in same language and with substantially the same content is published at a price reasonably related to that normally charged for comparable works.
	Note: after 7 years, licensee is free to seek new license governed exclusively by art. V—par. (9) of art. Vter; art. V license available to any national of contracting State without recapture.	
No comparable provision	License to translate a work published in printed or analogous forms of reproduction may be granted to broadcasting organizations in developing countries if made for the purpose of broadcasting, without any commercial purpose, and if sole purpose of broadcast is use for teaching or dissemination of results of technical research, and if broadcasts intended for reception in same developing country—par. (8).	Same as U.C.C.
No comparable provision	Under same conditions as above, license may also be granted to a broadcasting organization for translation of "any text incorporated in an audiovisual fixation which was itself prepared and published for the sole purpose of being used in connection with systematic instructional materials"—par. (8).	Same as U.C.C.

COLUMNAR COMPARISON OF SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES IN THE STOCKHOLM PROTOCOL AND THE PARIS REVISIONS (1971) OF THE U.C.C. AND BERNE CONVENTIONS.—Continued

PART IV: REPRODUCTION RESERVATION

Stockholm protocol	Paris revision of the U.C.C.	Paris revision of Berne—appendix
Art. 1(c): compulsory licensing system after 10 years unless right exercised by reproduction in original form in country where license might be sought.	Art. Vquater: exclusive period 5 years generally; exceptions—3 years for works of the natural and physical sciences, including mathematics and of technology; 7 years for works of fiction, poetry, drama and music, and for art books; license available unless authorized copies generally distributed in that State to public or in connection with systematic instructional activities at price reasonably related to that normally charged in State for comparable works—par. (1)	Art. III and IV: same as U.C.C.
Compulsory license to reproduce and publish for "educational and cultural purposes.	License only for use in connection with "systematic instructional activities".	Same as U.C.C.
"Just compensation" for compulsory licenses.	Just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned—par. (2).	Same as U.C.C.
Assurance of payment and transmittal subject to national currency regulations.	Assurance of transmittal of payment; if national currency regulations intervene, competent authority shall make all efforts by use of international machinery to insure payment in internationally convertible currency—par. (2).	Same as U.C.C.
Export permitted	Export prohibited as a rule—par. (1); however, printing abroad and subsequent return of copies in bulk permitted if printing not possible in licensing State due to lack of physical facilities or economic capability, subject to limitations; place of printing must be U.C.C. or Berne country, and the printing must be lawful in that country.	Same as U.C.C.
No comparable provision	Copies must bear notice stating available for distribution only in State where license applies—par. (2).	Same as U.C.C.
License to reproduce "literary or artistic work."	License to reproduce literary scientific or artistic works that have been published in "printed or analogous forms of reproduction"—par. (3).	Same as U.C.C. but with general reference to "works."
Recapture exclusive right by reproduction and publication in country concerned.	Recapture exclusive right by general distribution to public or in connection with systematic instructional activities at price reasonably related to charge in State for comparable works if substantially same language and content as edition published by licensee—par. (2).	Same as U.C.C.
No comparable provision	Notice of copyright must be printed by licensee if the original work bore U.C.C. notice—par. (2).	No comparable provision.
No comparable provision	License to reproduce audiovisual fixations and translation of accompanying text into language in general use in the country concerned if "prepared and published for the sole intrinsic purpose of being used in connection with systematic instructional activities"—par. (3).	Same as U.C.C.
License to reproduce work "in the original form in which it was created."	No compulsory license may issue to reproduce translation not published by the proprietor or under his authority nor to reproduce translation that is not in a language that is in general use in State issuing the license—par. (1).	Same as U.S.C.

COLUMNAR COMPARISON OF SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES IN THE STOCKHOLM PROTOCOL AND THE PARIS REVISIONS (1971) OF THE U.C.C. AND BERNE CONVENTIONS.—Continued

PART V.—BROADCASTING RESERVATION

Stockholm protocol	Paris revision of the U.C.C.	Paris revision of Berne—appendix
Art. 1(d): Substitute for art. 11bis(1) and (2) provisions that essentially correspond to the text of the 1928 Rome Convention on the broadcasting right: National legislation may regulate conditions, i.e. establish compulsory licensing system throughout term of copyright; right of authorizing broadcast and communication to public of broadcast if communication for profitmaking purposes; licenses subject to payment of "equitable remuneration."	No special provisions for developing countries; art. IVbis expressly recognizes the right to broadcast either in the original form or in any form recognizably derived from the original; national legislation may make exceptions that do not conflict with the spirit of the fundamental right; must accord "reasonable degree of effective protection."	No special provisions for developing countries; art. 11bis of the convention.

EXHIBIT C

LINDEN AND DEUTSCH,
New York, N.Y.

PARIS REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION—A RESPONSE TO COMMENTS OF THE DEPARTMENT OF STATE

This statement is in response to comments of the Department of State received in reply to our prior analysis of the Paris revision of the Universal Copyright Convention. This response is limited to points directly made by the Department in its letter of June 21, 1972 to Senator Fulbright. Additional points and amplifications are raised in our prior analysis.

The Department of State correctly recognizes that our comments are directed at two questions. The Department has declined to give any opinion on the second of these, namely, whether Congress should provide a means for compensating American authors and publishers who suffer financial injury by reason of the concessions granted to developing countries under the revised Universal Copyright Convention. Indeed, the Department's letter does not appear to contradict the likelihood of such injury, except to question the extent to which the developing countries will resort to the proposed compulsory licenses and to point to the fact that such countries might unilaterally impose more burdensome conditions in their own copyright laws.

We shall return to both of these points below; at this point we would simply note the Department's conclusion that "ratification of the revised UCC is in the national interest." We do not share this view. If, however, after a full examination of the facts the Senate should decide to ratify the revised Convention, the Trade Expansion Act of 1962 is ample precedent for Congress' obligation to compensate those American citizens who will be injured in the interests of our foreign policy goals.

The first question raised is whether the Senate should ratify the revised Convention. Although the questions are distinct, the answers cannot be separated. We do not believe that Congress should decide whether to adopt a course of action likely to cause economic injury to a class of American citizens without considering what devices are available to mitigate such injury.

The Department notes that "the Association of American Publishers, along with many other major copyright groups, including the American Bar Association, have firmly endorsed U.S. ratification of the UCC." We will concede that, at the present time, our position against ratification appears to be a minority one. It is shared, however, by several other publishers. We daresay that many of those groups which have endorsed ratification have done so with insufficient consideration of the potential impact of the revisions and might be disposed to modify their position upon a full examination of the facts. We refer, in this connection, to a recent article by counsel to the Authors' League, a copy of which is enclosed, entitled "Downgrading the Protection of International Copyright" in which Mr. Karp in essence holds that the Paris Revision of the UCC is the same sellout of authors and publishers as the notorious Stockholm Protocol. We would also note that it is one particular group, *authors and publishers of educational materials,* who will suffer most of the adverse effects of the revised Convention and that the viewpoints of this particular group have not been expressed publicly to date.

The chart prepared by the Copyright Office and included with the State Department's reply to Senator Fulbright is not inconsistent with the study prepared by our office. Both lead to the conclusion that the "improvements" of the Paris revision over the terms of the Stockholm Protocol are principally of a procedural nature, subject to application, interpretation, and implementation by each developing country. So far as authors and publishers of textbooks and other educational material are concerned, any improvements are minimal or illusory. Examples illustrative of this conclusion are given in our initial analysis of the Paris revision.

The Department's letter also points to the possible steps which may be taken by developing countries if not granted the concessions embodied in the revised UCC. We are not persuaded that the revision will not lead to substantially similar results even within the framework of an international convention. Furthermore, a number of developing countries already are members of either the Berne or Universal Copyright Conventions and their willingness to take steps requiring withdrawal from their existing Convention obligations is likely to be tempered by political considerations. Even if that were not the case, we cannot accept the notion that we should allow ourselves to be blackmailed into concessions injurous to the interests of American citizens. Foreign countries may wish to expropriate the tangible properties of American citizens situated abroad, but we have never consented to any prior, formal multinational legitimazation of such practices because of threats that it will be done anyway.

The Department states that, based upon experience with Article V of the existing UCC, it may be doubted that the compulsory licensing provisions will be utilized. To begin with, the new translation license of the Paris revision may become available sooner than is the case with the existing UCC provision; also, the concessions allowing foreign translation and manufacture facilitate use of the licenses. More significantly, perhaps, the compulsory license provisions obviously do not have to be resorted to in order to have their adverse effect. Their mere availability is sufficient to deprive international bargaining of any semblance of free negotiation. Where the requesting party may use a refusal by an owner of rights as a vehicle to more favorable terms, it becomes difficult for us to understand how "terms [can be] worked out between the parties involved without the need for recourse to the treaty." It is equally difficult to understand the zeal with which the developing countries sought the compulsory license provisions, and the piratical consequences the Department feels will enure if such concessions are not granted, if the provisions are not to be used.

The Department states that the revised UCC does not permit unpaid use, but requires that " 'due provision shall be made at the national level to ensure' that compulsory licenses provide for 'just compensation that is consistent with standards of royalties normally operating in the two countries concerned.' " It is obvious that the "due-ness" of the provisions, the "just-ness" of the compensation and its "consistency" with prior standards are subject to varying interpretations and considerations among each of the developing countries. It is not unwarranted to assume that what developing countries may deem "just compensation" to American authors and publishers will be less than a pittance. Similarly, in the area of audio-visual works and similar materials of the new educational technology, any pre-existing standards are illusory if not nonexistent; yet such materials require a great deal of investment of author and publisher time, expense and effort. We reiterate our opinion that, in practice, the compensation that actually would be paid under compulsory licensing can only be described as negligibile.

The Department also states that ratification of the revised UCC "will provide concrete evidence of the concern of the United States for the legitimate needs of developing countries in the field of education." These needs are valid. We question, however, whether it is the function of a class of individual American citizens to fulfill them upon terms imposed by an international, governmental agreement. Would not governmental loans abroad or governmental purchases under Constitutional guarantees and resale abroad or some similar means be more appropriate? The "educational needs" of developing countries also include schoolrooms, construction equipment, and instructional apparatus; to our knowledge, the producers of such physical properties have not been asked to make the sacrifices now to be required of owners of intangible property—American authors and publishers.

Should Congress decide, for some reason we cannot now acknowledge, that the fulfilling of "educational needs" is an individual function, there are the additional questions of whether the revised UCC is properly constructed to meet that end with adequate safeguards against appropriation of American property under circumstances not legitimately related to such needs; and of why the individuals should not be compensated for injuries occasioned by their contribution.

EXHIBIT D

[From Publishers Weekly, September 27, 1971]

Downgrading the Protection of International Copyright

(By Irwin Karp)

"Developed" and "developing" nations alike will want to study the diminished degree of international copyright protection which is foreseen in reports of major copyright revision conferences held in July in Paris.

Revised texts of the 1952 Universal Copyright Convention and Berne Convention were adopted at conferences held in Paris from July 5 to July 24. The purpose of the revisions, embodied in identical provisions of both new conventions, is to allow "developing countries" to diminish copyright protection by granting compulsory licenses to translate and reproduce books and audio-visual materials without the copyright owners' consent.

The 1971 UCC becomes effective when ratified by 12 countries. It must be ratified by the United States to apply to American works. Although the United States could not accede to the new Paris (Berne) Act until the 1909 Copyright Act is revised, the Paris Act will not become effective until the United States, France, Britain, and Spain agree to be bound by the 1971 UCC. A United States delegation participated in the UCC conference and sat as observer at the Berne conference.

STOCKHOLM PROTOCOL REVISITED

The Paris conferences climaxed four years of maneuvering that began with the Stockholm revision of the Berne Convention. At Stockholm, developing countries argued that they must have "freer access" to foreign copyrighted works than the Berne Convention permitted, to improve their education and culture. "Developing country," it should be noted, is an elastic term of formidable reach. It includes countries truly in early stages of economic and cultural development, such as the new African states. It also stretches to embrace Brazil, Yugoslavia, Israel, India, and many other nations well enough developed to maintain large armed forces, extensive government bureaucracies, publishing industries, and other amenities one ordinarily associates with "developed" countries. In fact, under the definitions in both new conventions, a substantial majority of United Nations members would qualify as developing countries, entitled to exercise compulsory licensing privileges.

"Freer access" also is an elusive term. At times it seemed to mean an improvement in communication between developing countries and authors or publishers in developed countries, so that voluntary licenses could be negotiated more easily. But ultimately it connoted something more drastic, *i.e.*, the privilege of translating or reproducing an author's work without his permission, or at a royalty lower than he asked for a voluntary license he is willing to grant.

A NEW KIND OF "FREE ACCESS"

A nation outside the copyright conventions can give itself this kind of "free access." It can, like the Soviet Union, allow its publishing houses, state or privately owned, to translate and publish foreign works without their authors' consent. It need not pay any royalties; or it can fix whatever rate it chooses. And like the USSR, it can make the royalties non-exportable when it chooses to allow them. However, a country bound by a copyright convention cannot override authors' rights so easily. It must protect the works of other member countries according to the standards of its convention. If it wants to appropriate works in violation of the standards, it must leave the convention. Or it can try to have the convention amended, downgrading the standards of protection to the point where it is free to adopt compulsory licensing, preferably while requiring other countries to continue giving full protection to its authors.

The developing countries of the Berne Union successfully employed this tactic at Stockholm in 1967. The Stockholm Act made several changes in the Berne Convention, including the appending of a Protocol to the main text. The Protocol contained a set of exemptions permitting the developing countries to grant compulsory translation and reproduction licenses, to "limit" the economic rights of authors for purposes of teaching and study, and to make other encroachments on the standards of protection required of member countries in the main text. When the panic subsided, developed countries realized they almost had surrendered too much of their authors' rights. They did not ratify the Protocol, and it never became applicable to their authors and publishers. The developing countries did not stalk out of Berne, or the UCC.

But talk of an exodus persisted; and developing countries continued to argue for "freer access" to copyrighted works of developed countries. In 1969 a joint UCC-Berne study group recommended the simultaneous revision of both conventions. And in 1970 revised texts were drafted for the Revision Conferences by UCC and Berne committees, each consisting of several developing and developed countries. The final draft texts were the result of two rounds of negotiations and preparation in which the developing and developed countries made concessions and gave up rights to reach a "delicate balance"—a compromise frequently referred to at the Paris conferences as "the package deal."

The developed countries expected that the draft texts would be adopted without substantive changes by the conferences, since they were the result of substantial compromises and thorough consideration. Their opening speeches emphasized the need for maintaining the "delicate balance" and not reopening the "package deal." But developing countries reopened the "package deal" and made changes, through amendments of the text and adoption of "interpretations" in the Report.

Since the United States is a member of the UCC and not of Berne, and since the same basic changes were made in both conventions, the discussion is keyed to the 1971 UCC.

THE BERNE SAFEGUARD CLAUSE

Article XVII of the 1952 UCC and the Appendix Declaration prevented any country belonging to both conventions from leaving Berne and relying on UCC for protection, in other Berne-UCC countries. The 1971 UCC eliminates this condition for developing countries, allowing them to leave Berne and retain UCC protection in any other country belonging to both conventions.

REPRODUCTION, PERFORMANCE RIGHTS

Article I of the 1952 UCC requires member states to "provide for the adequate and effective protection of the rights of authors and other copyright proprietors." It remains unchanged in the 1971 text, and is supplemented by a new article, *IV bis*, which states that the rights mentioned in Article I "include the basic rights insuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting."

While some observers see *IV* as upgrading the level of protection in UCC, it is doubtful that it adds much to the present obligation of Article I to provide "adequate and effective protection of the rights of authors." Moreover, Article *IV bis* allows member states to carve exceptions into these "exclusive" rights, declaring that any state may "make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights" of reproduction, public performance and broadcasting, so long as a "reasonable degree of effective protection" is provided. This could cover a wide range of exceptions which copyright experts in other countries might devise, particularly since their courts will be the only effective forums for deciding whether the "exceptions" they legislate comply with the provisions of *IV bis* of the UCC.

DEFINITION OF DEVELOPING COUNTRY

Article *V bis* defines a developing country as one so regarded "in conformity with the established practice of the U.N. General Assembly." There is no explicit practice, or list of developing countries. The U.N.'s Committee on Assessments has considered "developing countries" as those with a per capita income of $300 or less. But the developing countries at Paris strongly resisted the suggestion that this or any other concrete criteria be approved by the two Conferences. From a practical viewpoint, every country in both conventions may be free to decide for itself whether it is a developing country. Practically every South American, African, Middle Eastern, and Asian nation except Japan could qualify, as well as some European countries.

A developing country which notifies the Director General of UNESCO that it wishes to exercise the compulsory licensing provisions of the UCC may do so for ten years after the Convention comes into force and may renew the privilege for further ten-year periods.

THE PRESENT TRANSLATION LICENSE

Article V of the 1952 UCC guarantees the author's exclusive right of translation of his work for seven years following initial publication. Thereafter, if an authorized translation has not appeared in any country's national language or if the authorized translation is out of print, the country may grant its nationals non-exclusive licenses to translate and publish the work in its language. The applicant must have requested and been denied authorization by the owner of the translation right, or given notice to the publisher and designated diplomatic officials or organizations, if the owner cannot be found. The Article applies to all members of the Convention.

Article V requires assurance of just compensation, payment, and transmittal, a correct translation, and the title and owner's name printed on every copy. Very few compulsory licenses have been granted under Article V, perhaps because of the seven-year requirement.

THE NEW TRANSLATION LICENSE

The 1971 UCC retains Article V, with a few insubstantial changes. But it also adds a new Article *V ter* which permits developing countries—for purposes of "teaching, scholarships or research"—to grant compulsory licenses *three* years after publication, instead of seven, for translation into languages that are in general use in developed countries; and to grant licenses *one* year after initial publication for translation into languages not generally used in developed countries. Thus, a South American developing country could grant a license to translate an American novel into Spanish three years after it was first published in the United States, while India could grant a license to translate it into Kashmiri or Bengali one year after publication—if an authorized translation had not been published in that language or, if published, had gone out of print. These compulsory licenses are subject to the conditions of Article V and additional conditions of *V ter*, discussed below.

THE REPRODUCTION LICENSE

The 1971 UCC would also permit developing countries to grant non-exclusive compulsory licenses to reproduce works for "use in connection with systematic instructional activities." The license would permit reprinting of books in their original language and the reprinting of translation authorized by the owner, provided the language was in general use in the country granting the license.

The license can be granted if, within a specified period of time following initial publication of an edition, the owner has not distributed copies tin the country "to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works. . . ." The grace period for fiction, poetry, drama, music, and art books is seven years from publication; for scientific and technological books, three years; and for others, five years. Reproduction licenses may also be granted if, during a six-month period, no authorized copies are on sale to the public or for systematic instructional materials at a "reasonably related" price.

WORKS SUBJECT TO LICENSES

Reproduction licenses under *V quater* apply only to literary, scientific, or artistic works published in printed or analogous form, and to those audio-visual works, including incorporated text, which were prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Translation licenses under *V ter* apply to "writings" and permit "publication" of the translation. "Publication" means reproduction and distribution of copies which can be read or otherwise visually perceived; and, according to Article I of the UCC, a "writing" is a separate category of work, distinct from "musical, dramatic and cinematographic works, and paintings, engravings and sculpture. However, licenses to translate works composed mainly of illustrations may also authorize the reproduction of the illustrations, subject to the conditions of *V quater*. The Conference agreed that the lyrics of songs were not subject to the translation license.

Article *V ter* also allows developing countries to license broadcasting organizations to translate published works for use in non-commercial broadcasts intended for teaching or disseminating the results of research, or in recordings used for such broadcasts; the license may also cover texts of audio-visual works which were prepared for use in systematic instructional activities.

Developing countries which grant compulsory licenses are protected from retaliation. Thus no developed country can reduce the level of protection which it is obliged to give to works from such developing countries.

CONDITIONS OF COMPULSORY LICENSES

Articles *V ter* and *V quater* impose substantially similar conditions for the granting of compulsory translation and reproduction licenses. The applicant for the license must have requested and been denied authorization by the owner of the particular right, and must inform a designated information center of his request. If the owner cannot be found, copies of the license application must be sent to the publisher and a designated information center. A translation license cannot be granted until a further six months (for 3-year licenses) or nine months (for 1-year licenses) after the applicant requests a license from the owner or sends his application to the publisher. No license can be granted if an authorized translation is published during this period. There is a similar six-month grace period for reproduction licenses, but it is concurrent. The grace period for translation begins after expiration of the one- or three-year period.

Translation and reproduction licenses are not transferable; do "not extend to the export of copies," and are "valid only for publication in the territory" of the licensing country. Copies must bear a notice that they are for distribution only in the licensing state, the UCC copyright notice where required, the title, and the author's name. Translations must be "correct," reproductions must be "accurate."

Due provision must be made "at the national level" to insure that licenses provide "just compensation" consistent with normal royalty standards for "freely negotiated" licenses between persons of the two countries, and payment and transmittal. However, if currency regulations interfere (implying they may), "all efforts" should be made to insure transmittal in international convertible currency "or its equivalent."

TERMINATION OF COMPULSORY LICENSES

A compulsory translation license under *V ter* is terminated if a translation is published in the developing country by the owner (or with his authorization) with substantially the same content as the edition for which the license was granted, at a price reasonably related to that normally charged in the country for comparable works. A compulsory reproduction license is also terminated by distribution of authorized copies of the edition in the country, at "reasonably related" prices, to the general public or in connection with systematic instructional activities. In either case any copies made before the license is terminated can continue to be distributed. Translation and reproduction licenses cannot be granted when the author has withdrawn all copies from circulation.

These provisions were essentially the provisions of *V ter* and *V quater*, as set forth in the draft texts submitted to the UCC and Berne revision conferences—the "package deal." However, the "package" was opened and its contents considerably changed by adding further provisions to the text and by adopting "interpretations" which could influence the application of the license provisions as effectively as formal amendments. These are some of the changes.

(1) The right of translation was extended to include broadcasting.

(2) While compulsory licenses to translate into languages in general use in developing countries were only to be granted three years after publication. *V ter* was amended at the conferences to permit a developing country to grant such licenses after one year if all developed countries using the language agree. Thus, Brazil, by agreement with Portugal, will be free to translate American novels and other works into Portuguese, Brazil's national language, one year (plus nine months) after publication in the United States. The three-year limit cannot be reduced for compulsory license translations into English, French, or Spanish.

HOW BROAD IS "SCHOLARSHIPS"?

(3) The one- and three-year compulsory translation licenses were supposed to be used, according to *V ter*, "only for the purpose of teaching, scholarship or research." However, the Report of the UCC conference states that "scholarship" refers not only to instructional activities in schools and colleges "but also to a wide range of organized educational activities intended for participation at any age level and devoted to the study of any subject." Delegates from developing countries made it clear that they understood the area of use to be extremely broad, and that it included the sale of copies to the public. Similarly, the compulsory reproduction license, according to *V quater*, was supposed to be used for the publication of editions "for use in connection with systematic instructional activities." However, the Report states that "this term is intended to include not only activities in connection with the formal and informal curriculum of an educational institution, but also systematic out-of-school education." And some delegates again indicated their view that sale of copies to the public was permitted. Discussion at the conference reflected broad, loose interpretation of educational and instructional activities that could easily encompass the translation or reproduction—and general sale—of novels and other trade books on optional reading lists of schools, adult education centers, radio or television lecture series, correspondence courses, and the like. Some delegates indicated their belief that any use that promoted "culture" served an educational purpose.

(4) A basic premise of the "package deal" was that copies produced under compulsory licenses could not be expected; and licenses were to be "valid only for publication in the territory" of the developing country which grants the license. However, the developing countries succeeded in amending *V ter* to allow a licensing country to export copies of translations produced under compulsory license, in any language except French, English or Spanish, to its nationals in other countries, for "teaching, scholarship or research."

(5) A fundamental question is whether the holder of a compulsory license can have the copies printed in another country. If a developing South American, African or Asian country grants one of its nationals a license to translate or reproduce an American biography, novel of textbook, may he have the edition printed in Taiwan, or East Germany, or Czechoslovakia? May he hire a translator in another country? And may nationals of several countries, all granted compulsory licenses for the same American work, use the same translator and have their copies produced abroad by the same printer? Developing countries strongly resisted an explicit requirement that printing be done in the country granting the compulsory license. They argued that some countries did not have the facilities to print translations or reproductions.

It was also argued, incorrectly, that this imposed a "manufacturing clause." But the manufacturing clause requires an American author to print his books in the U.S. as a condition for securing U.S. copyright. The printing limit proposed by Argentina and Great Britain was a limit on developing countries that grant compulsory licenses, to protect the author against an expanded use of those licenses. The limit would not restrict the author's right to have his book printed where he chooses. If he grants a voluntary license to a publisher in a developing country, the limit would not apply.

Actually, the limitation was already inherent in the provisions of *V ter* and *V quater* which prohibited the export of copies made under compulsory licenses and prescribed that the licenses "be valid only for *publication*" in the licensing country. Article VI of the UCC defines "publication" as "the reproduction in tangible form and distribution to the public of copies of a work. . ."

After much discussion, a formal "interpretation" of Articles *V ter* and *quater*, and the corresponding Articles in the Berne Convention, was prepared by a joint drafting committee of Berne and UCC countries for insertion in the reports of both conferences. The interpretation has essentially the same effect as an amendment of the texts. It declares that the provisions prohibiting "export" of copies and making compulsory licenses "valid only for publication" in the country granting the license "are considered as prohibiting a licensee from having copies reproduced outside" that country. However, it then declares that the prohibition does not apply where the licensing state does not have printing or reproduction facilities, or its facilities "are incapable for economic or practical reasons of reproducing the copies"; the copies are reproduced in a Berne or UCC country; they are returned in bulk to the licensee; the reproduction is lawful where done; and it is not done in a plant especially created for reproducing works covered by compulsory licenses. The interpretation also states that *V ter* and *V quater* do not prohibit a compulsory licensee from employing a foreign translator, or several licensees in different countries from using the same unpublished translation. The interpretation states that no compulsory license should be used for commercial purposes.

EFFECT ON AUTHORS' RIGHTS

How adversely these last minute changes will affect authors' rights needs more careful consideration that the delegates could give, and a better knowledge of publishing than many of them possessed. The chairman of the Conference, in his closing remarks, observed that the system of compulsory licenses would not satisfy "the world of authors" in the developed and developing countries. He hoped that compulsory licenses would be an exception, as they had been since 1952. And a principal reassurance offered authors by the architects of the 1971 revisions is that few licenses will be issued. But if that is so, then there is no need to adopt these new provisions which sharply downgrade the level of protection in UCC and Berne. A more realistic forecast may be a substantial increase in compulsory licenses; because the time period for translations is reduced from seven years to one year, or three years; because compulsory reproduction licenses are expressly sanctioned; and because the last minute changes on "outside" translation and printing make compulsory licenses cheap and easy to use.

WHY AUTHORS ARE UNHAPPY

Some architects of the 1971 revisions assume it contains reasonable safeguards for authors. But, as the chairman noted, their views are not likely to satisfy the "world of authors," and with good reason. First, the architects cite the "limited" purpose of compulsory licenses. But "education," "scholarship" and "systematic instructional activities" have been broadly interpreted in the Report, and by delegates from several developing countries, so there is no real obstacle to the compulsory translation or reproduction of books for sale, in large part, to a general reading audience. Moreover, there is no practical way for an author to stop the improper issuance or misuse of a license.

Second, the architects assume that authors and publishers can prevent compulsory translation licenses by having authorized translations published. But translations cost money to prepare and to publish. And they must be kept in print, since a six-month lapse would still open the door for compulsory licensing. Actually few authors or publishers could afford the expenses of issuing translations of a book into several languages as insurance against compulsory licenses. They need some hope of an audience, and market, for the translation; and it is precisely that which the compulsory license system may deny them. The architects also suggest that authors can prevent compulsory licenses by issuing a translation in the six- or nine-month grace period after the request for a license is received. But even assuming translations could be made and published so quickly, this is totally unrealistic. The applicant is not obliged to exercise his compulsory license within a specified time, or to use it at all. Once he gets it, he can just sit with it. Therefore, an author or publisher could not know whether he was spending money for a translation to defeat a compulsory license that never would be used. Furthermore, while publication of an authorized translation, anywhere, would prevent a compulsory translation license for that language, it exposes the translation to a compulsory reproduction license.

If the 1971 UCC comes into effect, American authors and publishers will be faced with these problems for the thousands of works already in print that have not been translated into French, Spanish, Portuguese, or other languages used in developing countries.

CAN AUTHORS PROTECT THEMSELVES?

Third, the architects assume that authors can protect themselves against compulsory reproduction licenses, and terminate translation and reproduction licenses that have been granted, by distributing copies of an authorized edition in the developing country which issued the license. But this requires not only distribution, but distribution at a "price reasonably related" to the price "normally" charged there "for comparable works." Finding a distributor in some countries can itself be a problem. Finding one who will sell an authorized edition in competition with the compulsory-license edition may be more of a problem; even when the license terminates, the backlog can be sold off. The difficulties may multiply where the developing country owns or controls its publishing facilities. Will a state-owned publishing house distribute the author's authorized edition if that terminates its compulsory license to issue the work, or prevents it from obtaining a compulsory reproduction license at a low royalty? Even if the author or publisher can find a distributor, can their authorized edition meet the second requirement; can it be sold at a "price reasonably related to that normally charged" for comparable works, if the comparable works are sold at a narrow mark-up, or at cost, or below cost, by a state-owned or subsidized publisher, or acquired cheaply (or free) from a foreign state under the "outside printing" interpretation?

Fourth, the architects note that a compulsory license cannot be granted until the owner's authorization has been requested and denied. But what choices face the author or publisher who receives a request for authorization to translate or reproduce a work? As noted, he cannot afford to rush a translation into print each time. He can accept, reject, or bargain for better terms than the applicant offers. If the royalty offered him is unsatisfactory, his chances of increasing it by bargaining are as slight as his bargaining power. He is under the gun. If he rejects the royalty offered him, the applicant will receive a compulsory license, with the royalty rate fixed by authorities in the developing country. And with this alternative, it is unlikely that those requesting his authorization will offer him generous terms.

No minimum royalty is specified in the 1971 UCC. It requires only that compensation be "consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the two countries concerned." If the author is not satisfied with the rate fixed by the authorities of the developing country, under this broad mandate, he could challenge it only in the courts of the developing country. In fact, all objections to the issuance of licenses woud have to be made there. That requires a considerable investment for every license, with not too promising a chance of success. The 1971 UCC provides no other forum for authors or publishers aggrieved by their treatment in developing countries.

Even allowing for a substantial discounting of these possible dangers, a compulsory licensing system is a dismal prospect for the "world of authors" in developed and developing countries. It becomes more dismal if several developing countries can issue compulsory licenses for the same work, use on translator to translate if, and have the translation printed in quantity in one plant in another country; or have a large quantity of copies run off in the plant under reproduction licenses issued by all of them. Mass production is possible. And compulsory licensing becomes an even more attractive alternative to voluntary arrangements between the author and developing countries that want to use his work. It also offers some developed countries an inexpensive means of extending aid to unuderdeveloped countries, *i.e.* printing cheap, mass paperback editions of books by authors from other developed countries. Under the "outside printing" interpretation, each developing country will decide whether its own printing facilities "are incapable for economic reasons of reproducing the copies" of foreign works for which it issues compulsory licenses.

As the chairman of the UCC conference suggested, compulsory licensing should not be the ordinary means of providing for publication in developing countries. It should be the rare exception, used only where voluntary negotiations cannot secure for a developing country the right to publish a book it truly needs for educational purposes, and then with fair compensation for the author. Authors are entitled to ask for a rigorous analysis of the complsory licensing system are entitled to ask for a rigorous analysis of the compulsory licensing system created at both Paris conferences, in the texts and by the interpretations, to determine whether it is likely to produce only a few compulsory licenses or to encourage their use as a fundamental means of acquiring translation and publishing rights. For if the latter result develops, authors will, in effect, be compelled to subsidize "developing" countries, including some well able to pay normal royalties. This is a sacrifice not asked of manufacturers of soft drinks, industrial equipment, automobiles or other products—including those purchased by developing countries for the construction or operation of schools. Nor is it a sacrifice likely to be asked of translators who will translate under compulsory licenses, or publishers who will be granted those licenses in developing countries. If subsidies are required to aid education in developing countries, they would more appropriately come from the governments of developed countries, including funds to pay royalties on copies translated or reproduced in developing countries under voluntary licenses.

Ultimately the Senate will have to decide if the United States ratifies the 1971 UCC. If it does not, the United States would remain a party to the 1952 UCC, and the new compulsory licensing provisions would not apply to American works. Moreover, the Paris Act of the Berne Convention would not become effective. Developing countries might leave Berne or the UCC. They would then be free to institute compulsory licensing systems of their own devising, or deny any protection to foreign works. But their works would not be entitled, under the Conventions, to protection in other countries. Retaliation in the long run, if not the short, might persuade them to remain in the UCC or rejoin it.

Ratification would freeze a compulsory license system into both Berne and UCC for decades to come, available to a majority of the members of the U.N. for an unpredictable period of time. When, for example, will Brazil or Yugoslavia or India decide they have become developed countries? If Brazil or Yugoslavia or Israel are still developing countries, how long will it take for less developed developing countries to become developed? These are some of the questions left unanswered by the Paris Conferences. And in the shadow of these questions, a careful analysis of the effects and consequences of the two new conventions is imperative, before the Senate decides what action the United States should take.

Mr. BRENNAN. The Educational Media Producers Council. The witnesses are Mr. Otterman, David Engler, and Robert Frase.

STATEMENT OF LLOYD OTTERMAN, CHAIRMAN OF THE EDUCATIONAL MEDIA PRODUCERS COUNCIL AND VICE PRESIDENT OF BFA EDUCATIONAL MEDIA; ACCOMPANIED BY DAVID ENGLER, CHAIRMAN, COPYRIGHT COMMITTEE; AND ROBERT FRASE, CONSULTANT

Mr. OTTERMAN. Mr. Chairman, my name is Lloyd Otterman and I am chairman of the Educational Media Producers Council (EMPC) and vice president of BFA Educational Media. I am appearing here today on behalf of EMPC and with me are David Engler, chairman of the EMPC Copyright Committee and Robert W. Frase, economist and consultant on copyright to EMPC.

We have submitted formal testimony to this subcommittee. I ask now that it be included into the record.

Senator BURDICK. Without objection, it will be included.

Mr. OTTERMAN. I will be highlighting those formal remarks in an effort to meet the time constraints we have here today.

We are here to give you our views on S. 1361, and specifically on the issues involved in the educational use of copyrighted audiovisual materials. We support the bill as introduced and oppose amendments which would weaken the protection provided in the bill to those materials.

Let me sketch briefly the economics of producing audiovisual materials for education. This background will be helpful in understanding the importance of appropriate copyright protection in order to insure the continued development of high quality materials for educational use.

EMPC has some 70 members who produce audiovisual materials for use in schools and libraries—materials such as motion pictures, filmstrips, slides, transparencies, and sound recording. We estimate that our members produce 80 percent of these educational audiovisual materials.

In 1972 total sales of educational audiovisual materials amounted to $215 million, produced by some 200 companies; thus the industry is clearly one of active competition among quite small firms.

These materials are designed for instructional purposes, and have no market among consumers in general or for general entertainment.

Because of the way in which audiovisual materials are used in the educational process, the number of copies produced is quite limited. As compared with textbooks, for example, which are generally provided one to a student, one or two copies of a 16-millimeter educational film may serve an entire school system of moderate size; and a single copy of a filmstrip will serve an entire school. A typical audiovisual product will customarily sell in the hundreds or low thousands over 5 to 10 years, as compared with tens or hundreds of thousands of textbooks. Thus the initial investment in editorial work and production, which costs as much for one copy as for thousands, is spread over a relatively limited number of copies. In addition to the substantial initial investments necessary to the production of quality materials there must be added carrying costs for the considerable period of time over which sales are made. The combination of these factors—small editions and sales over an extended period—means that unauthorized duplication of copies has a much greater impact on the economic viability of these products than on some other types of educational materials.

The U.S. Office of Education has granted millions of dollars over the years to educational research laboratories for developing more effective teaching methods and materials. Many good products were developed, but far too few were disseminated to the educational community. Why? Because policies were not developed which allowed companies with marketing expertise to distribute the materials under the protection of copyright. However, recently, USOE revised its policy and provided copyright protection. Now the educational community receives the benefit of the Federal research and development effort.

I think this points out very clearly the need to provide incentives for the production of materials and the need to protect the rights of the copyright holders. The federally funded materials, which under the noncopyright policy were developed and not marketed are now being used by students—because of the incentives given producers to manufacture and distribute the materials. We note that S. 1361 recognizes these realities.

We believe that S. 1361 is a good bill and will provide the necessary incentives to the continued production of quality audiovisual materials for use in the educational system.

We commend the subcommittee in particular for its proposals with respect to fair use and here we have specific reference to section 107 of the bill.

We are pleased that the principal professional organizations of educators directly concerned with the use of audiovisual materials in the educational process, composed of 8,000 members directly concerned with it, has also recently come out in support of section 107 of the bill and in opposition to the so-called educational exemption.

I have here their formal testimony submitted to me this morning. I am reading from page 7, paragraph 2,

> Although the AECT's position differs from that of the Ad Hoc Committee on the need for general education exemption, we continue to remain a member of that group.

The statement issued by the executive committee of the Association for Educational Communications and Technology, which is an affiliate of the National Education Association, given on May 31, 1973, is contained in attachment A. I ask now that that statement be placed in the record at this point.

Senator BURDICK. Without objection.

[The statement referred to follows:]

(*Attachment A*)

COPYRIGHT LAW REVISION: A POSITION PAPER

The members of the Association for Educational Communications and Technology (AECT) believe that technology is an integral part of the teaching-learning process and helps to maximize the outcomes of interaction between teacher and pupil.

Regulations governing United States Copyright were originally developed to promote the public welfare and encourage authorship by giving authors certain controls over their work. It follows that revisions in Title 17 of the United States Code (Copyrights) should maintain the balance providing for the compensation of authors and insuring that information remains available to the public. Some of the revisions proposed in S. 1361 lose sight of this balance between user and producer.

AECT endorses the criteria to be used in the determination of "fair use" as contained in Section 107 of the proposed bill:

Section 107.—Limitations on exclusive rights: Fair use . . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [Section 106], for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) The purpose and character of the use;

(2) The nature of the copyrighted work;

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) The effect of the use upon the potential market for or value of the copyrighted work.

Further, we endorse the concepts regarding the intent of these criteria as expanded in the legislative history of the bill as it existed prior to and without regard to the original opinion in the case of Williams and Wilkins v. U.S., for that opinion substantially narrows the scope of "fair use" and irreparably weakens that doctrine.

However, we propose that the concept of "fair use" should apply equally to the classroom teacher and media professional—including specialists in audiovisual and library resources. Media personnel are becoming increasingly important members of educational planning teams and must have the assurance that they may assist classroom teachers in the selection of daily instructional materials as well as with long range curriculum development. Classroom teachers do not always operate "individually and at [their] own volition." The fact that the media professional makes use of advance planning and has knowledge aforethought of the materials he prepares for the teacher should not invalidate the application of the "fair use" principle.

Concerning the use of copyrighted works in conjunction with television, AECT proposes that "fair use," as it has been outlined above, should apply to educational/instructional broadcast or closed-circuit transmission in a nonprofit educational institution, but not to commercial broadcasting.

Once the doctrine of "fair use" has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine. We believe that the enactment of the "fair use" concept into law prior to negotiations will guard against the erosion of that concept. Generally, a reasonable fee should be paid for uses that go beyond "fair use," but such fee arrangement should not delay or impede the use of the materials. Producers are urged to give free access (no-cost contracts) whenever possible.

We agree with the Ad Hoc Committee of Educational Organizations and Institutions on Copyright Law Revision that duration of copyright should

> provide for an initial period of twenty-eight years, followed by a renewal period of forty-eight years, whereas the proposed bill sets duration at the "life of the author plus fifty years." It seems reasonable that provision should be made to permit those materials which the copyright holder has no interest in protecting after the initial period to pass into the public domain.
>
> Regarding the input of copyrighted materials into computers or other storage devices by non-profit educational institutions, we agree with the Ad Hoc Committee that the bill should clearly state that until the proposed National Commission on New Technological Uses of Copyrighted Works has completed its study, such input should not be considered infringement. The proposed bill states only that ". . . [Section 117] does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with any similar device, machine, or process . . ."
>
> A new copyright law that both uses and producers can view as equitable depends upon the mutual understanding of each other's needs and the ability to effectively work out the differences. We will participate in the continuing dialogue with the Educational Media Producers Council and similar interest groups to establish mutually acceptable guidelines regarding the boundaries of "fair use," and reasonable fees to be paid for uses beyond "fair use." This dialogue will be espeically important in the area of storage, retrieval, and/or transmission of materials during the time period between the enactment of the law and the issuance of the report of the proposed National Commission on New Technological Uses of Copyrighted Works.
>
> We feel that the above modifications of S. 1361 are needed to insure that the revised law assists rather than hinders teachers and media specialists in their work.

Mr. OTTERMAN. Some of the statements made by the AECT which we wish to share with you follow:

> AECT endorses the criteria to be used in the detremination of "fair use" as contained in Section 107 of the proposed bill. And I am quoting from their statement here.
>
> Once the doctrine of "fair use" has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine.
>
> A new copyright law that both users and producers can view as equitable depends upon the mutual understanding of each other's needs and the ability to effectively work out the differences. We will participate in the continuing dialogue with the Educational Media Producers Council and similar interest groups to establish mutually acceptable guidelines regarding the boundaries of "fair use" and reasonable fees to be paid for uses beyond "fair use."

EMPC has not only been conducting a dialog with AECT but has taken the initiative in setting up a series of meetings with other educational organizations—regionally and nationally—to discuss mutual problems relating to copyright. We believe that these discussions have been helpful not only in clarifying general principles but in dealing with specific problems as well. On our part we pledge to continue these discussions—both before and after any revision of the copyright law.

At the time that this testimony was prepared we were unclear—in light of the positions taken by AECT and other groups (such as the Music Educators National Conference and the National Music Council)—as to whether a broad educational exemption, to be added to the bill as it now stands, would be proposed by one or more organizations. Well we heard the ad hoc committee testimony this afternoon. Their language, in our view, provides far more than a limited exemption. Among other things it would authorize use for noncommercial teaching scholarship and research not only of brief excerpts from copyrighted works but also of the whole of short literary, pictorial and graphic works.

The concept of brief excerpts—which are not substantial in length in proportion to their source—is very difficult to pin down as applied to educational A–V materials. A half hour educational film; for example, may be built around an exceedingly difficult photographic sequence which may take months of work to capture, but may in the final product only take up a minute or two of time of the film. To permit this minute or two to be reproduced freely under the proposed exemption would very likely destroy the economic availability of such a film.

Further, the concept of exempting use of the whole of short, literary, pictorial and graphic works presents difficulties equally great in relation to audiovisual materials. For example, is a short filmstrip a short work? If so, it would very largely destroy the entire market for short filmstrips.

We trust that this subcommittee will not accept the idea of an educational exemption, if such an exemption should continue to be pressed by one or more organizations. The position taken by AECT indicates that as far as educational audiovisual materials are concerned, such an exemption has no educational rationale. To the extent that school systems wish to reproduce educational audiovisual materials in whole or in part beyond the limits of fair use, our members stand ready to discuss licensing arrangements which will permit authorized reproduction. Modern methods of reproduction for many types of audiovisual materials are such as to make such reproduction in whole or in part attractive to some school systems and our members have already entered into such licensing arrangements. In fact, only recently on June 18–19, 1973, we sponsored jointly with the Information Industry Association a conference in Washington on the licensing of copyrighted materials.

In summary, let us repeat that we think that S. 1361 is a good and workable bill, from the point of view of both the creators and the users of educational audiovisual materials.

We appreciate this opportunity to appear before your subcommittee. My colleagues and I will be glad to elaborate on any points in our testimony which the members of the subcommittee may wish to explore further.

Senator BURDICK. Thank you very much for your statement.

Mr. ENGLER. Mr. Chairman, I wonder if I might take a moment to respond to a question that Senator McClellan raised a little while ago when he wondered what the publishers might think of the ad hoc committee's contention that the proposed educational exemption would help the growth of the audiovisual materials industry?

I would like to respond by first pointing out that the 10.8 percent annual growth cited by Dr. Wigran is indeed a healthy growth rate and is one that we enjoy because we have copyright protection. We think it vital to the public interest that any revision of the copyright law maintain that protection. We are convinced that the ad hoc committee's proposed educational exemption would deal a severe blow to this young and growing industry.

I might point out that this small industry's total revenue of $214 million represents less than one-half of one percent of the total dollars spent on education in this Nation. And I might also point out that among the 200-odd companies in this industry there are only a handful on the Fortune 500 list. The overwhelming majority are small businesses that do not have the resources to sustain the potential impact of the sweeping exemptions called for by the ad hoc committee.

We are convinced that such an exemption would inevitably lead to a serious reduction in the quality and quantity and variety of audiovisual materials available to students and teachers.

Senator BURDICK. Thank you.
[The statement of Mr. Lloyd Otterman in full follows:]

COPYRIGHT AND AUDIO-VISUAL MEDIA

My name is Lloyd Otterman and I am Chairman of the Educational Media Producers Council (EMPC) and Vice President of BFA Educational Media. I am appearing here today on behalf of EMPC and with me are David Engler, Chairman of the EMPC Copyright Committee and Robert W. Frase, economist and consultant on copyright to EMPC.

We are here to give you our views on S. 1361, the general copyright revision bill, and specifically on the issues involved in the educational use of copyrighted audio-visual materials. We support the bill as introduced and oppose amendments which would weaken the protection provided in the bill to audio-visual materials.

Before dealing specifically with the bill itself, I should like to sketch briefly the economics of producing audio-visual materials for education. This background will be helpful to the subcommittee in understanding the importance of appropriate copyright protection in order to ensure the continued development of high quality materials for educational use.

THE EDUCATIONAL AUDIO-VISUAL MATERIALS INDUSTRY

The Educational Media Producers Council (EMPC) is an organization within the National Audio-Visual Association made up of approximately 70 producers of audio-visual materials for use in schools and libraries. Our membership consists primarily of the creators of these materials, who are engaged in the various activities necessary to produce and market such audio-visual materials.

The companies belonging to our Council produce such items as motion picture films, filmstrips, slides, transparencies, and sound recordings. We estimate that our members account for approximately 80% of the annual production of these principal types of audio-visual materials for use in American education.

In 1972 total sales of educational audio-visual materials amounted to $215,000,000. This volume was produced by some 200 companies; and thus the industry is clearly one of active competition among quite small firms as compared to the great majority of industries serving a nationwide market

The relative volume of the various products sold in 1972 is shown in the following table:

1972 Sales of Educational A–V Materials

	(Millions)
Predominantly materials acquired by school districts and film libraries:	
16mm (black and white) films	$6.6
16mm (color) films	47.4
Subtotal	54.0
Predominantly materials acquired for use and shortage in individual schools:	
8mm films (silent)	9.5
8mm films (sound)	.6
Filmstrips (silent)	18.0
Filmstrips with records	24.5
Filmstrips with cassettes	17.7
Overheads	10.6
Slides	2.6
Records	8.0
Recorded tapes:	
Reel-to-reel	2.9
Cassette	18.0
Study Prints	9.8
Multimedia kits:	
A–V oriented	14.9
Print-oriented	12.3
Games, manipulatives & realia	11.3
Subtotal	160.7
Grand total	214.7

It will be noted this list of products is divided into two principal categories: 16 millimeter educational films, which are comparatively lengthy and more expensive and thus are bought by school district film libraries, stored centrally, and circulated to individual schools, on demand; and other types of materials which tend to be used more often and more intensively in the individual schools and therefore are stored as well as used there. With the increasing use of materials in the educational process, and with the recent trend toward the individualization of instruction, this second category has been growing much more rapidly than the first in the last few years, increasing from 60 percent of total audio-visual sales only six years ago to 75 percent of total sales in 1972.

USE BY LEVEL OF EDUCATION

Equally important to an understanding of the educational audio-visual industry is the pattern of use at the several levels of education. The following table shows 1972 sales broken down in this way:

1972 Educational A-V Sales by Type of Institution

	(Percent)
Elementary schools (K–8)	50
Secondary schools (9–12)	30
Colleges and universities	8
Public libraries	3
Churches, Government, export, miscellaneous	9
Total	100

The percentages in these tables bring out two points quite graphically:

(1) These are materials designed for instructional purposes, and have no market among consumers in general or for general entertainment.

(2) Sales tend to be concentrated in the lower end of the educational pyramid, with half of total sales to the elementary schools, 30 per cent to high schools, and 8 per cent to higher education. Public libraries account for 3 per cent and all other for 9 per cent. It is important to distinguish materials for the instruction of students at these *basic levels* of education from the advanced, highly sophisticated, original research published in scientific and technical journals; the kinds of considerations which come into play in discussing library photocopying of such research materials are not pertinent here.

SMALL EDITIONS

Because of the way in which audio-visual materials are used in the educational process, the number of copies produced is quite limited. As compared with textbooks, for example, which are generally provided one to a student, one or two copies of a 16 millimeter educational film may serve an entire school system of moderate size, and a single copy of a filmstrip will serve an entire school. A typical audio-visual product will customarily sell in the hundreds or low thousands, as compared with tens or hundreds of thousands of textbooks. Thus the initial investment in editorial work and production, which costs as much for one copy as for thousands, is spread over a relatively limited number of copies. In addition to the substantial initial investments necessary to the production of quality materials there must be added carrying costs for the considerable period of time over which sales are made. The combination of these factors—small editions and sales over an extended period—means that unauthorized duplication of copies has a much greater impact on the economic viability of these products than on some other types of educational materials.

THE U.S. OFFICE OF EDUCATION EXPERIENCE

The U.S. Office of Education has granted millions of dollars over the years to educational research laboratories for developing innovative and more effective teaching methods and materials. Many good products were developed, but far too few ever were disseminated through the educational community. Not until policies were developed which allowed companies with marketing expertise to distribute the materials under protection of a limited (in time) copyright, did the educational community receive the benefit of the Federal research effort.

I think this points out very clearly the need to provide incentive to produce and protection of rights for copyright holders. The Federally-funded materials which were developed and put on shelves, now have a much better chance of being used by, and benefiting, the intended recipients—because those with the expertise necessary to make the materials available are given the incentive to deliver their maximum effort.

PROVISIONS OF S. 1361—FAIR USE

We turn now to the actual provisions of S. 1361 as they relate to educational audio-visual materials. The bill clearly represents the culmination of years of consideration and reflects particularly the work of this subcommittee and the information it has received in hearings and in other ways. We believe that it is a good bill as it relates to our industry and will provide the necessary incentives to the continued production of quality audio-visual materials for use in the educational system.

We commend the subcommittee in particular for its proposals with respect to "fair use," and here we have specific reference to Section 107 of the bill. (The further specialized provision of Section 108 relating to reproduction by libraries and archives is for the most part not directly relevant to audio-visual educational materials.) Section 107 writes into statutory law the main principles of "fair use" as that doctrine has been interpreted by the courts in individual cases over the years, and specifically states that "fair use" is a concept applicable to all kinds of copying, including copying for purposes of education.

ENDORSEMENT OF SECTION 107 BY AECT

We are pleased that the principal professional organization of educators directly concerned with the use of audio-visual materials in the educational process has also recently come out in support of Section 107 of the bill. This was done in a statement issued by the Executive Committee of the Association for Educational Communications and Technology (AECT) on May 31, 1972. (See Attachment A.) Some of the statements made by the AECT which were of greatest interest to us were the following:

(1) "AECT endorses the criteria to be used in the determination of 'fair use' as contained in Section 107 of the proposed bill."

(2) "Further, we indorse the concepts regarding the intent of these criteria as expanded in the legislative history of the bill as it existed prior to and without regard to the original opinion in the case of Williams and Wilkins v. U.S., for that opinion substantially narrows the scope of 'fair use' and irreparably weakens that doctrine."

(3) "Concerning the use of copyrighted works in conjunction with television, AECT proposed that 'fair use,' as it has been outlined above, should apply to educational/instructional broadcast or closed-circuit transmission in a nonprofit educational institution, but not to commercial broadcasting."

(4) "Once the doctrine of 'fair use' has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine."

(5) "A new copyright law that both users and producers can view as equitable depends upon the mutual understanding of each other's needs and the ability to effectively work out the differences. We will participate in the continuing dialogue with the Educational Media Producers Council and similar interest groups to establish mutually acceptable guidelines regarding the boundaries of 'fair use,' and reasonable fees to be paid for uses beyond 'fair use.'"

Since AECT has announced its intention of presenting testimony in these hearings, we will not attempt to interpret the statement, but leave that to the witnesses for that organization. We should like, however, to make reference to two points. First, the Commissioner's recommendations and opinion in the Williams and Wilkins case in the Court of Claims will certainly have been superseded by the decision and opinion of that court itself well before any general copyright revision bill is finally enacted. Second, we welcome continuation of the dialogue between AECT and EMPC relating to the use of educational A–V materials, but must point out that there would be legal difficulties in any action by EMPC in agreeing to establish "reasonable fees to be paid for uses beyond 'fair use'."

We have not only been conducting a dialogue with AECT but have taken the initiative in setting up a series of meetings with other educational organizations regionally and nationally to discuss mutual problems relating to copyright. We believe these discussions have been helpful not only in clarifying general principles but in dealing with specific problems as well. We on our part pledge to continue these discussions both before and after any revision of the copyright law.

NO NEED FOR AN "EDUCATIONAL EXEMPTION"

At the time that this testimony was prepared we were unclear as to whether a broad educational exemption, to be added to the bill as it now stands, would be proposed by one or more organizations in the light of the positions taken by AECT and other groups such as the Music Educators National Conference and the National Music Council. However, as recently as April 4, 1973 the so-called Ad Hoc Committee issued a press release indicating its support for a "limited educational exemption"; and the language of such an exemption had been presented to members of this subcommittee late in 1972 and given wide general circulation. That language in our view provided far more than a "limited" exemption. Among other things it would authorize use for noncommercial teaching scholarship and research not only of "brief excerpts" from copyrighted works but also of the whole of short literary, pictorial and graphic works.

Let us take up these two concepts in order, as they would apply to educational audio-visual materials. In making these comments we have had the benefit of discussions with participants in the work of the Ad Hoc Committee seeking clarification of their proposals; but we do not here purport to be speaking for them.

The concept of "brief excerpts (which are not substantial in length in proportion to their source)" is very difficult to pin down as applied to educational A–V materials. A half hour educational nature or biological film, for example, may be built around an exceedingly difficult photographic sequence which may take months of work to capture, but may in the final product only take up a minute or two of time. To permit this minute or two to be reproduced freely under an educational exemption would very likely destroy the economic viability of such a film.

The concept of exempting use of "the whole of short, literary, pictorial and graphic works" presents difficulties equally great in relation to audio-visual materials. For example, is a short filmstrip a short work? If so it would very largely destroy the entire market for short filmstrips and they would not be produced at all by audio-visual films.

We trust that this subcommittee will not accept the idea of an educational exemption, if such an exemption should continue to be pressed by one or more organizations. The position taken by AECT indicates that as far as educational audio-visual materials are concerned, such an exemption has no educational rationale. To the extent that school systems wish to reproduce educational audio-visual materials in whole or in part beyond the limits of "fair use," our members stand ready to discuss licensing arrangements which will permit authorized reproduction. Modern methods of reproduction for many types of audio-visual materials are such as to make such reproduction in whole or in part attractive to some school systems and our members have already entered into such licensing arrangements. In fact, only recently on June 18–19, 1973, we sponsored jointly with the Information Industry Association a full dress conference in Washington on the licensing of copyrighted materials.

SUMMARY AND CONCLUSIONS

In summary let us repeat that we think that the bill which has evolved in your subcommittee as S. 1361 is a good bill and a workable bill, from the point of view both of the creators and the users of educational audio-visual materials. We urge that it not be changed as it relates to A–V materials, and that it be expeditiously reported to the Senate. It is universally recognized that revision of the 1909 copyright statute is desirable, and the sooner this is accomplished the better for all concerned.

We appreciate this opportunity to appear before your subcommittee. My colleagues and I will be glad to elaborate on any points in our testimony which the members of the subcommittee may wish to explore further.

Senator BURDICK. Next?

Mr. BRENNAN. Mr. Paul Zurkowski, Information Industries Association.

STATEMENT OF MR. PAUL G. ZURKOWSKI, PRESIDENT, INFORMATION INDUSTRY ASSOCIATION BY MR. J. THOMAS FRANKLIN, CHAIRMAN, PROPRIETARY RIGHTS COMMITTEE, AND MR. CHARLES LIEB, ADVISORY MEMBER, PROPRIETARY RIGHTS COMMITTEE

Mr. ZURKOWSKI. While the others are joining me I will introduce them.

Tom Franklin is the Chairman of our Proprietary Rights Committee. Mr. Franklin is Counsel to International Data Corporation, Newtonville, Massachusetts. Charles Lieb is an advisory member on our Proprietary Rights Committee and is a member of the New York Law firm of Paskus, Gordon & Hyman.

We welcome this opportunity to testify, we have submitted a statement that covers both the library photocopying exemption and the educational exemption and I ask that it be included in the record.

Senator BURDICK. Without objection.

Mr. ZURKOWSKI. First, I would like to second the remarks of Ambassador Keating. As you will note in our statement, we share many of the same ideas and concerns. The Information Industry is a new industry. It is made up of companies that are engaged in applying the new technologies to the creation and dissemination of information.

Our member companies are engaged in addressing the kinds of problems that Chairman McClellan and you make reference to in terms of finding a funding mechanism to facilitate the application of these technologies to the dissemination of information.

I could provide example after example of detailed negotiations between producers and users of information who are working out those details within the framework of copyright.

Senator BURDICK. Excuse me, but I will be perfectly frank. I would like to get all of the light I could on this subject because I know it is a difficult one. I know in the smaller libraries as it stands now I don't see how they could possibly set up a system they could properly fund to take care of these small amounts. I don't see how it is possible in a library in, say, Williston.

Mr. ZURKOWSKI. That is my home country too, Senator. I'm from Wisconsin and know the kinds of libraries and the kinds of situations you refer to. I grew up in a town of 700 and I can't imagine that the Palmyra Public Library will ever have the economic resources to apply this power, but I'm afraid that both the library and the educational exemption in trying to facilitate a flow of information then these technologies are in danger of throwing the baby out with the wash water.

The Information Industry is a young industry and it is just beginning to have its impact. It does perform extensive pre-processing efforts in anticipation of the needs of users.

If you take an in-depth view of the work of an information industry company, you can see how its efforts relate to the creative efforts of an author. It starts with the user. It spends time with the user at his place of work. It identifies where the user is when he needs information. it then tailors the product to that need. It gathers information. It develops a program by which to process it within the computer. It keypunches it and introduces it into the computer. It develops a program to bring it out of the computer to create a product that is human usable.

It also then has to educate users to the use of this product.

Several points emerge from that list. Each of these steps are expensive and complex. Many of the products of such efforts qualify for copyright protection as works of authorship. The economic viability of these products, if they are to be created at all, depends on each user paying his fair share of the fully amortized costs of creating and delivering the product. It is on that basis that we have to object to the library photocopying exemption.

It is not a photocopying exemption: it is a single copy exemption. It would put libraries, and major libraries in particular, into competition with the private companies doing similar work whether that be in providing microfilm collections, in providing data bases in machinable form, or in providing specialized services of many other kinds.

The availability of free information on an on-demand basis would compete rather decisively and would have a disastrous impact on the industry.

Copyright has been the mechanism through which libraries and publishers have worked out their relationsip. If you take that mechanism away by adopting this amendment, there won't be a forum within which to work out these details. So, we recommend that, if this thing is to be given serious consideration, it should be referred to the commission to be established by Title Two. That commission will have the opportunity to develop the hard facts, the hard economic data that has been absent in these hearings as to the justification for such an exemption, and would provide a forum within which the contending interests would have a chance to constantly interact with each other.

Going on to the educational exemptions, we raise in our statement several questions about that both of an economic and a technical nature. Mr. Sackett previously mentioned the fact that the educational exemption would grant an exemption for input and that it would no longer be an infringement to put copyrighted material into a computer for educational and other purposes. This not only conflicts with Section 117 of the bill, which says that status quo shall be preserved pending the outcome of the Title II Commission studies, but would enable the educational institutions to put anything into a computerized data base.

Such traditional library materials as the Readers Guide to Periodical Literature, something that is created, typeset & published today by the H.W. Wilson Company, could be put into a computer data base by the libraries under a fair interpretation of this language. The result would be that information of all kinds would be in the file. It would be argued because the printout of the specific answer sought is small, it would create a whole different system of information dissemination depending on government funding rather than the investment of private risk capital.

If you take both the educational exemption and the library exemption together, you have an opportunity under the education exemption to put into the computer almost anything and then a right under the library exemption to make a single copy of it on demand. The combination of the two proposals would create quite a business operation for libraries and drain off a great deal of business from traditional publishers through inter-library basis as well as from information companies specializing in such business.

There are many implications of both of these amendments both nationally and internationally. Former Register of Copyrights, George Carey, has addressed the implications of copyright as input in a speech he gave last October to the American Society for Information Science.

In the recent discussions with the Russians about their adherence to the Universal Copyright Convention, they indicated they were watching the outcome of the Williams and Wilkins decision in order to assess their own position and what they would pay for the use of copyrighted American materials. Some of our member companies derive as much as 50% of their income from foreign sales. With exemptions such as those proposed here, U.S. companies would face great difficulty in obtaining fair returns from abroad where the degree of protection offered here is likely to be matched in kind.

I refer you to our prepared statement for a fuller discussion of the matters raised here only superficially. I now defer to Messers Franklin and Lieb for any additional comment they may wish to make.

Mr. LIEB. Senator, may I answer the question, or attempt to answer the question you raised?

I would like to answer the question if I could about the library in North Dakota. I don't think the position that has been presented today by any of the cooperating and supporting groups, the Authors League or the Association of American Publishers or any of the others, in any way affects the right of the librarian in Williston to do exactly what she is doing now. The issues, I think, when they are refined down to the discussions which we have had today, are three. One is the copying of articles in scientific journals. Here organizations like the American Chemical Society and a for-profit company like Williams and Wilkins, say that if large research libraries, like the National Library of Medicine and the National Institutes of Health, which were involved in the *Williams* and *Wilkins* case, continue to do large-scale wholesale copying, they will be unable to continue the publication of their journals.

I do not think that the librarian in Williston is going to be terribly concerned about that. If on rare occasions she needs a copy of the article, the making of that copy whether it is a technical violation or not will be a matter of indifference, and really one article is not important in the whole overall view.

The second thing is the photocopying of books. Everybody is in agreement now that there should be no library photocopying of whole works other than articles unless they are not available, unless they are out of print, and that really is the provision of section 108, which the libraries are basically in agreement with.

So, again the librarian in Williston is not affected and indeed is helped by that provision because, if there is a book that she is asked for by one of her patrons and it is out of print and she determines that by looking at the books in print list, she will be able to get it.

Senator BURDICK. But suppose it is available in New York City? Would she then have to mail for it?

Mr. LIEB. We are talking of a whole book, Senator. If the book is Johns' History of the Napoleonic Wars, sold by Random House for $15 with 800 pages with photographs, she certainly shouldn't be requested by the patron to make a photocopy of that book if Random House has that book available for sale.

Senator BURDICK. Suppose the student wants page 50 of the Napoleonic Wars. Would she have to write to New York?

Mr. LIEB. No, sir. I think that unintentionally there was a misunderstanding about that here this morning. Nobody is suggesting that the student in Williston can't go in and say, please give me a copy of page 50 of that book on snakes, or give me a copy of three pages of Johns' book on the Napoleonic War, because this kind of copying everybody concedes is fair use copying.

Senator BURDICK. Suppose it is page 50 of a chemical journal?

Mr. LIEB. Well, I can't speak for the Chemical Society, but I would say that, if it is a single page in a 10 or 20 or 30 page article, I would think that the Chemical Society would say that that page may be copied under the principles of fair use.

Senator BURDICK. This morning they said no, though.

Mr. LIEB. No, they didn't. They were talking about the copying of whole articles.

And the third aspect of what we are talking about, again coming down to the librarian in Williston, is the claim that the classroom teacher needs some sort of exemption so as to enable him to teach.

We have urged the teacher associations to sit down with us and attempt to lay out as detailed as necessary a set of guidelines and working rules so that the average teacher can determine safely what he can and what he cannot copy. So, my answer to your question is that your librarian will not be affected injuriously at all by the position taken by the copyright groups, and will be helped insofar as books out of print are concerned by section 108 as your subcommittee has prepared it.

Senator BURDICK. But it won't be helpful for the books in print?

Mr. LIEB. Well, if a book is in print, if it is available, it should be purchased or borrowed but not copied, sir.

Senator BURDICK. Yes, but this young man comes in there and he just wants page 50—and I will go back to my example—and the librarian goes to his digest and says, oh, but you can get that at X company in New York.

Mr. LIEB. Senator, that is not so. That is a false issue. If he goes in and says, I want page 50, there is nobody in this room today who would say that he can't have it. That is not the issue before you.

The issue before you is, can an entire journal article, a scientific article, be photocopied? That is the first issue. And the second issue is, can a substantial portion of a book in excess of fair use be photocopied? Nobody is talking about small libraries.

Senator BURDICK. Well, someone here today—and I have been running back and forth to vote—but someone said, you can't make single copies.

Mr. FRANKLIN. To try to wrap this up, if I could, there is a whole lot of valuable information that has been brought forth here today on the doctrine of fair use.

The point that the Information Industry Association wishes to stress most strongly, and I think the point that most of the opponents of the NEA amendment feel very strongly on, is that the fair use doctrine today, whatever its precise limitations may be, should not be extended by the engraftment on S. 1361, which represents many years of compromise, of a special ad hoc amendment as proposed by NEA.

It involves very complex and difficult economic factors including your high school student in Williston question, Senator. You must have the economic data necessary in order to properly evaluate the tradeoffs involved in the NEA amendment and they simply have not been presented to this committee.

For that reason alone I think this committee should not feel authorized to propose such an amendment to the bill. There is a lot of work to be done on determining what will be the economic impact of the NEA amendment. The proponents have failed to establish what effect their amendment would have. That work is presently assigned by the provisions of the title II to the National Commission and should be left there.

Senator BURDICK. As far as work is concerned, we have been working for 4 years on this, or is it three?

Mr. BRENNAN. Perhaps longer than that.

[The statement of Paul G. Zurkowski in full follows:]

TESTIMONY OF PAUL G. ZURKOWSKI, PRESIDENT AND EXECUTIVE DIRECTOR, INFORMATION INDUSTRY ASSOCIATION

My name is Paul G. Zurkowski. I am President and Executive Director of the Information Industry Association, 4720 Montgomery Lane, Bethesda, Maryland, 20014, (301) 654-4150. I am the first Executive Director of the Association that is now little more than four years old. It has over 60 member firms engaged in a wide variety of commercial information activities. A list of members is attached. Immediately prior to this employment, I served for about five years as legislative assistant to Congressman Bob Kastenmeier, of Wisconsin.

My involvement with the information industry flows directly from that service with Mr. Kastenmeier during the years the Revision Bill was under consideration in the House. My personal interest has always been in the communication of information—documented ideas. Service on Mr. Kastenmeier's staff served to educate me about the important role copyright plays as *the* basic funding mechanism by which the *creative* and *business* activities required to obtain dissemination of information is paid for.

Copyright is a populist monopoly; it assures access for everyone to the ideas of the creative few. It enriches our lives, facilitates our life-long education, and assures the equal availability of information. I left my happy home with Mr. Kastenmeier because I saw the need for a funding mechanism of equal effectiveness in the information technology arena. The practical day-to-day experience of the information industry in creating and marketing information through the application of computers, microfilm and other technologies, new and old, alone or in combination, is that copyright is as valid for this industry as it is for industries which market information as books or journals. Perhaps even more so.

The basic function of this industry is in many respects the other side of the coin of traditional publishing. It is rooted in the abundance of information available to everyone in every discipline. As a general proposition it can be said that information companies identify particular information headaches of very specialized groups of people and seek to pre-process the information of interest to that group in such a way as to facilitate its use.

Another way of describing the mission of the industry is to use the word *Relevance*.

The activities of member firms include, but are not limited to, the following:

(1) *Topical publications*—providing up-to-date information on all facets of a given special interest area, including law, regulations and/or tariffs topically arranged and cross referenced for easy access;

(2) *Current awareness* publications, such as indexes, collected tables of contents, abstracts, citation lists, reports on pending legislation, etc.;

(3) *Catalogs*, including mail-order catalogs, parts lists, price lists, and tables of interchangeable parts;

(4) *Directories*, including those classified by activity, address, etc.;

(5) *Encyclopedias, directories, thesauri*, finding lists and references, aids;

(6) *Files searches*, including computer searches of machine-readable files at the computer site or by remote access terminals;

(7) *Standing order services* ranging from computer search of current publications through news clipping services offering delivery of information on specific interest profile topics;

(8) *Manuals* for operation and repair of equipment;

(9) *Serial reports*, such as court decisions, board rulings, financial reports;

(10) *Periodic publication of related material*, such as journals in hard copy or microform, and voice recordings of talks on related topics;

(11) *Face-to-face meetings*, such as symposia, conferences and conventions;

(12) *Exhibits and demonstrations* for educational, promotional or merchandising purposes; and

(13) *Tours* of plants, facilities, monuments, museums, etc.

Although a variety of communications media are employed, all the above activities have in common the *anticipation* of the need for and the *preprocessing* of *relevant* information. They all involve the expenditure of time, money, and human effort in organizing information materials to meet anticipated needs. They all have a common objective—that of producing economically competitive information products relevant to the addressee's interest, regardless of the media involved.

Many member activities relate to the preparation of what could be classed as "library materials"—materials in printed form for industrial, institutional, agency, business, shop, academic or personal collections. Others reorganize related reference materials for better access. Such products and services require frequent reorganization and amendment to keep them current. Efforts to keep files up-to-date are currently duplicated and re-duplicated in industrial, institutional and personal reference collections. Technologies for economical, rapid, remote access to centrally up-dated information files reduce the need to maintain separatelocal files. It also reduces the number of copies needed for local files. Costs other than communications charges are involved. The development of such technologies have wide application to society's information problems.

Our basic purpose for appearing here today is to underscore the significance of copyright and to emphasize the need to maintain the integrity of copyright as a funding mechanism for this process. Private risk capital will be applied to this process, and society will have the benefit of continuing advances in the application of these varied technologies, only so long as the investors in this process have a reasonable expectation of receiving a reasonable return on their investment. The only alternative to the investment of private risk capital and the reliance on competition in the marketplace, not only the commercial marketplace, but the marketplace of ideas, is the reliance on the investment of state capital, and its attendant preemption of areas open to competition

Since the Information Industry Association did not exist at the time of the 1967 House Passage and Senate Hearings, we have not previously participated in the revision hearings process. We are, in effect, a new face and one which may not be readily recognized. We feel therefore it is important for us to provide you with detailed information about the activities of the industry.

Information companies create information, refine information, organize information, develop access tools for getting at information. All of these activities add value to information. They make it easier for you to find the information you want. By preparing the tools for you to do this effectively and efficiently they save you time and money. The information industry in authoring these products substitutes the "sweat of its brow" for yours.

The whole information industry process is itself comparable to an individual author's efforts in creating a work. By taking an "exploded" view of the work of information industry company you can see how the efforts it makes relates to the creative efforts of an author.

The steps involved in creating and marketing an information product:

(1) Start with the user. Identify his information problem or need. Spend time with him in his work environment to identify how he uses information,

where he is when he needs information, whether he has an immediate need or a need than can be filled subsequently in time.

(2) Gather information from a wide variety of sources and experiences.

(3) Review it, analyze it, organize it, eliminate irrelevancies.

(4) Design a formula for putting it into machine readable form.

(5) Process it into a machine readable form

(6) Design a formula for manipulating the information within the machine to produce the specifically desired end product.

(7) Develop the graphic arts embodiment of that end product, and in other respects design and produce a "human-useable" product.

(8) Educate users to the advantages of the product and in other ways market the product to the group of users for whom the product is designed and developed.

Several points emerge from that list:

(a) Each of these steps, starting with the time spent identifying user needs and continuing through each step of the process to the delivery of the product to the user, is complex and costly.

(b) Many of the products of such efforts qualify for copyright protection as works of authorship.

(c) By virtue of their special design and highly refined specialized markets, they are extremely sensitive to any attrition in the size of their expected market whether through photocopying or other replication methods for by-passing copyright protection. The economic viability of such products, whether they are to be created at all, depends pretty much on each user paying his fair share of the fully amortized cost of creating and delivering the product.

SINGLE COPY LIBRARY PHOTOCOPYING

Before addressing ourselves to the question of the single-copy exemption sought by the libraries, let me state at the outset that the information industry and libraries have many things in common. We are part of the same piece of cloth. Both groups are essentially populist in outlook. We seek to make information as widely available as possible. A major distinction between us is our cost-accounting methods. The industry must operate on a fully allocated cost-accounting basis whereas libraries can and do evaluate services on an incremental cost basis.

The information industry itself represents an attempt by some far-sighted members of the publishing community augmented by people who come at this field from the information technology side to restructure the publishing business to accommodate its skills, and resources to the imperatives of information technologies.

The library community, likewise, is undergoing a major restructuring. Inter-library cooperation, the "mother" library concept, the emergence of some forms of charges for "inter-library" loans and for special research projects are illustrations of ways in which the library community is being restructured to accommodate itself to the fact, costs, and advantages of information technologies. A Presidential Commission on Libraries and Information Science only recently has been estabilshed to provide assistance and national perspective to this effort. This restructuring process has been accelerated and aggravated by the serious funding problems facing the library community. We have high regard for the efforts libraries have made and are continuing to make. We also feel libraries have an even greater future as community information centers with immense implications for the educational and cultural as well as economic well-being of us all.

We empathize with the library community and recognize and respect the deeply held motivations which give rise to its request for this single copy exemption. We must, however, oppose the amendment.

Such an exemption would put libraries in the reprint business in direct competition with the information industry. It would give the library an unfair advantage to market reprint materials from its holdings. (Whether it sold these materials or gave them away free, or for the cost of the copying the result would be the same.) It would ironically enable libraries to do so with the products of publishers and information companies without the ultimate users paying a fair share of the costs of the creation and distribution of the information. What looks desirable on an incremental cost analysis to libraries multiplied nationally is a disaster on a fully allocated cost basis for the industry. Such a free information source would lead to more limited circulation of much higher priced products. The paying user will be required in this way to subsidize the non-paying user.

Would there be any basis for a micropublisher to create and market a complete collection of materials in microfilm if a "mother" library could freely copy individual pieces of the collection for its users or the users of its subsidiary libraries?

How would special report information companies which create specialized studies for 75 to 100 customers or less stay in business if some or all of these customers could go to a library and obtain individual copies free of copyright?

How does the information company which authors a machine readable data base market its product when libraries would be able to market access to the same data base free of copyright? A search of such a data base provides a printout of single articles within the proposed library photocopying language, yet that is in most cases the only way a product of the data base will be generated and used inside or out of a library.

Based on our experience we urge that the library exemption contained in Section 108 be limited to archival copying only. Any additional exemption directly undermines the integrity of the copyright concept and denies the basic principle behind copyright that science and the useful arts will be benefited by providing the author a limited monopoly by which to market the product of his creativity. The library amendment, honoring only the copyright claims of the producers of motion pictures, subjects to the single copy exemption all other categories of information products, whether they be sound recordings, machine readable files or microfilm, in addition to inkprint products such as books and journals. One might just as easily abolish copyright altogether.

Copyright has been the mechanism by which libraries and their suppliers have established working relations. Before you decide to abolish this element in the relationship between libraries and their suppliers, and that is what you would do if you enacted the language sought by libraries, we recommend you defer this language to the Title II National Commission on New Technological Uses of Copyrighted Works.

The library single copy exemption does impact directly on new technological uses of copyrighted works, and adopting the amendment would deprive the Commission of the benefit of continued efforts to develop sound funding mechanisms through the day-to-day interaction in the real world of suppliers and libraries. To the information industry, libraries are established distribution nodes in a national information distribution network serving users. This network has been established working within the framework of copyright and, until it can be shown a better way exists, the basis for that working relationship should be maintained.

We respectfully urge that you defer action on the amendment pending the results of the study of the National Commission to be established by Title II of this bill.

PROPOSED EDUCATION EXEMPTION

We oppose this amendment on economic and technical grounds.

We have a high regard for the educational community as well as the library community. We do, however, have to object to the proposal since it would not only adversely effect the industry but it would have a pervasive effect on many others and on the development of the information service structure of the United States as a whole.

Economically, it would—

(a) Exempt input from copyright protection.

(b) Raise pressures to stretch the Fair Use exemption to cover "small" output.

(c) Put no limit on what could be put into an education computer.

(d) Create unintended and unfair competition for information industry.

(e) Ignore and undermine the business practice of licensing use.

(f) Restructure information services so as to eliminate stimulas and creative force of risk capital and competition.

(a) By implication this amendment acknowledges that to input copyrighted materials into a computer system is an infringement.

The amendment, by exempting input, would strip the author of control over his documented ideas. Without input infringement protection not only can his ideas be used, but they can be re-documented and distorted as to *source, meaning* and *context*.

A search of a data base may produce the fact that there is nothing in the file to print out. That, of itself, is often of great value. That is one of the purposes of investing in the creation of a comprehensive data base. Information that no one has done what you want to do has value. The amendment denies this and would destroy the economic value of that aspect of the author's work.

To search a data base is to "use" the whole file, not just the answer you find. This search capability is a value the amendment denies as well.

(b) The small printouts resulting from most computer searches would by their size alone it will be argued constitute "fair use" of the information. Having inserted in the computer The Encyclopedia Britannica, brief extracts could be printed out. Notwithstanding the fact that that is the only way to use encyclopedia information, many would seek to treat it as fair use. Since there is no provision for any payment system in the proposal, this apparently is the intended result.

(c) Under the language of the proposal "entire works" of any kind could be reproduced for machine processing.

The *Reader's Guide to Periodical Literature*, for example, could be keypunched and installed in a computer system. Encyclopedias and all the other products of the information and publishing industry would be equally exposed to such treatment. Without anything but "fair use" limits on copying and use (how do you apply fair use to the use of a whole file in making a computer search?) and with complete freedom to put entire works into a computer the protection offered by copyright would be minimal.

(d) The result would be the creation of unfair competition for the information industry. Does the educational activity have an iron-willed discipline and a policing procedure by which to assure that its computer information service serves only bonafide students? Many universities now engage in the marketing of information, not only in their city and state, but across the nation. They do so from a tax exempt haven and often without fully allocating to each user the costs of creating and delivering the information. This amendment would create great pressure to market machine readable versions in competition with inkprint and other privately published media. An Association of Scientific Information Dissemination Centers has been created to facilitate the growth of these activities.

(e) In practice few, if any, data bases are marketed exclusively through the author's computer facility. Copyright at input merely provides the author a basis for a licensing agreement by which the users of other computer facilities gain access to his documented ideas. The user is protected in that the integrity of the information and its documentation are subject to continuing contractual relations. This licensing process facilitates the widest possible sharing in the cost of creating these services. The amendment would not only free a large segment of users from paying its fair share of these costs, but it would also encourage education to engage in the economic replication of already existing and privately funded capabilities.

(f) Competition in the information marketplace in an age of information abundance is essential to competition in the marketplace of ideas. The stress on exemptions would have the effect of eliminating competition in many areas because the basis for private creation and investment, a minimal proprietory position, would be eliminated for many. The result would be a diminished, rather than enhanced, competitive climate in the marketplace of ideas. The information service structure of the U.S. would have to rely primarily on education and government capital resources for its development. The elimination of risk capital in this effort would seriously retard development in this area in the U.S.

On technical grounds the amendment would—

(a) expand its intended objectives by virtue of the proliferation of non-profit uses today.

(b) conflict with the intended purposes of Section 117.

(c) provide only for a method of recording "retrieval" and no for requiring its use, nor for recording "use" itself as distinguished from "retrieval".

(d) make rules otherwise applicable, presumably including "fair use" and the library single copy exemption.

(e) preempt much of the work of the National Commission on New Technological Uses of Copyrighted Works.

(a) The proliferation of non-profit uses, particularly in information, today are legend. Government funding of research in information systems work, for example, is essentially limited to grants to non-profit organizations. This has led to the development of a whole generation of organizations performing this research on a non-profit basis. Separate non-profit groups have grown up to do similar research in education. Public Interest law firms are incorporated in many cases on a non-profit basis. We raise these questions not to challenge the purposes of these groups but to suggest that the amendment is unduly broad as drafted and would serve, if enacted, to stimulate even further the development of subsidy-based activities.

(b) The amendment conflicts with the purpose of Section 117 to maintain the status quo in the law vis a vis copyright at input. The significance of such a development can be seen clearly through a reading of a paper by former Register of Copyrights, George O. Cary, presented at the 1972 meeting of the American Society for Information Science. It appears at pages 169–174 in *The Proceedings of the ASIS Annual Meeting*, Vol. 9, 1972, ASIS, Washington, D.C. We commend it to the attention of the Committee and the Congress.

(c) A method of recording retrieval, as provided for in the amendment, does not require that it be used any more than the seat belt statutes do. Furthermore, retrieval, as noted above, is not a complete measure of the uses made of a copyrighted work in computer form.

(d) The reference to other rules applicable under law apparently refers to "fair use" rules. How reasonable that is for modern information products where the ultimate users should each pay their fair share of the costs is a matter that has not been fully developed and one on which this industry has not yet formulated a position. It is a matter which should be referred to the National Commission

Furthermore, when it is contemplated that this proposal would be coupled with the library single-copy exemption, there appears to be no copyright protection left.

(e) The proposal if adopted would preempt not only much of the work of the National Commission, but it would also deprive it of the benefit of day-to-day experience developed as suppliers and users seek to work out within existing copyright concepts workable relations for the dissemination of information through these technologies.

This exemption is, in effect, based on the assumption that enough is known today about the effect of the technologies on copyright and the dissemination of copyrighted materials. It may very well be true that this committee could, if it assigned this matter top priority, come to an appropriate determination based on what is known today. That record has not been established here today or in previous hearings. As in other copyright areas, legislation can be based on an extended record of practices developed between conflicting interests. What you are asked to do by this amendment is to enact into law the position of one of the parties and to ignore the practices and positions of the others. We feel it is premature to decide now upon such a major innovation in American Copyright law and that the amendments, both the Library Single-Copy amendment and the Education Exemption should be referred to the Title II National Commission.

As we have argued with the Library exemption, the education exemption in the clearest language is subject matter clearly within the jurisdiction of the National Commission. We respectfully urge that the Commission be established and assigned the fact-gathering function essential to sound legislation. As we have earlier stated, we are ready and willing to be of assistance in working with the Commission in this major undertaking.

CONCLUSION

We wish to draw the Committees attention to the significance of these two amendments in an international sense. What protection U.S. Law provides information will have an effect on how the information products of our technology-based system are treated abroad. Some of our members derive as much as 50% of their revenues from foreign sales, from foreign users seeking to acquire information about the many aspects of the operations of our technologies, etc. The USSR, only recently having joined the Universal Copyright Convention, has also adopted a provision of its copyright law to provide for copyright-free reproduction of printed works for "non-profit scientific, dadactic and educational purposes." Information companies will have little to debate in seeking to receive fair compensation from foreign users for their services if U.S. Law embodies similar provisions.

The domestic effect of the amendments we have described obviously have far-reaching implications internationally, particularly since the U.S. is not only a major producer of copyrighted materials, but it is also a world leader in the development of information technology applications to their distribution. The U.S. must carefully consider major innovations in applying copyright rules to these new media.

We thank you for this opportunity to share our views with you.

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Senator BURDICK. Thank you. We are recessed until 10 tomorrow.

[Whereupon, at 4:30 p.m., the subcommittee recessed to reconvene at 10 o'clock a.m. Wednesday, August 1, 1973.]

COPYRIGHT LAW REVISION

WEDNESDAY, AUGUST 1, 1973

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS
OF THE COMMITTEE ON THE JUDICIARY
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 1114, Dirksen Senate Office Building, Senator John L. McClellan, presiding.

Present: Senators McClellan [presiding], Burdick, and Fong.

Also present: Thomas C. Brennan, chief counsel.

Senator MCCLELLAN. The committee will resume hearings this morning under the same general guidelines and procedures that we observed yesterday. I think everyone is familiar with them.

Who is our first witness this morning?

Mr. BRENNAN. Mr. Chairman, the committee this morning will consider the cable television royalty schedule, and the first witnesses appear on behalf of the Motion Picture Association.

Mr. Valenti, will you identify yourself and your associates for the record?

Mr. VALENTI. Mr. Chairman, I am Jack Valenti. I am president of the Motion Picture Association, and with me is Mr. Gerald Meyer of the Nizer law firm of New York who is counsel for the committee; to my left is Herbert Stern, of MCA, vice president, who is a member of our committee; Mr. Gerald Meyer, counsel and to my far left is Mr. Chester Migdin, who will speak briefly later.

I also have members of our committee in the rear, including Mr. Arthur Schiner, who is associate to Mr. Hadl, attorneys here in Washington, as well as member of our committee and Dr. Robert Crandall, associate professor of economics at MIT and Mr. Lionel Fray, our consultant of the economic consultants, Temple, Barker & Sloane, Inc.

Senator MCCLELLAN. Very well, Jack. Do you have a prepared statement?

Mr. VALENTI. Mr. Chairman, we have a statement; I have some notes that I'm going to speak from.

Senator MCCLELLAN. Do you wish to have this printed in the record?

Mr. VALENTI. Yes, sir.

Senator MCCLELLAN. All of it printed in the record?

Mr. VALENTI. Yes, sir.

Senator MCCLELLAN. Very well, it will be received and it may be printed in the record in full.

You may proceed.

STATEMENT OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC., AND CHESTER MIGDEN, ON BEHALF OF FILM UNIONS AND GUILDS ACCOMPANIED BY; GERALD MEYER, COUNSEL; LIONEL FRAY; CONSULTANT: ROBERT W. CRANDALL; AND DAVID HOROWITZ

Mr. VALENTI. Mr. Chairman, my time is obviously very brief. We have a total of 20 minutes, and that's only a fragment of time, and I am going to get on with this. I will begin at the very beginning.

As you know, in 1971, in order to hasten the passage of the copyright legislation, negotiations were begun at that time between the broadcasters, copyright owners and cable systems. Those meetings, as you know, were sponsored by Chairman Burch of the FCC and Dr. Whitehead of the Office of Telecommunications Policy at the White House.

In November of 1971, the now famous consensus agreement was signed by all three groups. There were compromises made in those three positions, Mr. Chairman; each side gave up something in order to reach an agreement in what we thought was an absolutely essential agreement before copyright legislation could speedily pass the Congress.

As a result of this agreement, most distant signal carriage restrictions were lifted. Cable systems were permitted to import programs from distant cities. The freeze was off and expansion of cable had begun.

Now, all parties to this agreement pledged themselves to support the concept of a speedy passage of the legislation, and also the concept of an arbitration tribunal that would be put in the bill if the parties could not agree on a private schedule of fees.

Now let me read to you the specific paragraph in the consensus agreement which nails down and fastens down this kind of support that all three parties gave. "Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees."

Shortly after the consensus agreement was signed, Chairman Burch wrote Senator McClellan and said: "We believe that the adoption of the consensus agreement will markedly serve the public interests."

On the 31st of January, Senator McClellan replied to Chairman Burch, and I would like to quote from that letter, because I think it is important in this aspect of the arbitration tribunal. Senator McClellan to Chairman Burch: "As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties."*

Now, shortly thereafter, John Gwin who was the Chairman of the Board of NCTA communicated with the Committee of Copyright Owners and asked our support in implementation of all the provisions of the consensus agreement and particularly the support of copyright owners in opposing any reconsideration of the FCC's report and order's unfreezing the carriage of distant signals.

Now, we agreed to that and we agreed to it for a very special reason which we reported to Chairman Burch. We told Chairman Burch, we told the Chairman that since all parties had agreed to support the consensus agreement, and in view of the exchange of letters between Chairman McClellan and Chairman Burch, the copyright owners were satisfied that the legislation implementing the consensus agreement would go forward and that all parties would support the consensus agreement and redeem their pledges of support for that provision which calls for the arbitration tribunal.

Therefore, the copyright owners said, we have no objection and we will not oppose the unfreezing order put out by the FCC.

Now these rules went into effect, as you well know, on March 31, 1972.

Thus the copyright owners received no benefits in the consensus agreement and the cable systems received all that they had bargained for. Negotiations began immediately, Mr. Chairman, as the consensus agreement ordered, if we could find a private agreement on a fee schedule that we could present to you for inclusion in the bill.

Now, the consensus agreement ordered this, and both sides sat down to talk, but it became very clear that once the unfreezing systems noticeably changed and noticeably stiffened. In more than 60 hours of exhausting and tormenting negotiations, it became very clear there would be no agreement reached. Deadlines were continually lengthened and it finally became very plain to us that cable systems had no intention of budging off the fee schedule which was put in the bill. They had determined that that was where they were going to make a stand, and they did.

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*[Editor's note: A letter from Chairman John L. McClellan to Chairman Dean Burch, dated May 5, 1972 follows:]

MAY 5, 1972.

HON. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: I have been informed of the decision rendered on May 2nd by the United States District Court for the Southern District of New York in the copyright infringement case of Columbia Broadcasting Systems, Inc. v. TelePrompTer Corp. holding that the retransmission of broadcast signals by cable systems does not constitute a performance of a copyrighted work and consequently does not violate the copyright statutes.

In view of this development, it may be useful for me to restate my view—and I believe that of all the members of the Senate Subcommittee on Patents, Trademarks and Copyrights—that cable television systems should be subject to the copyright law and that generally such systems should pay reasonable copyright royalties. It remains my intention to seek the enactment of the legislation for general revision of the copyright law at the earliest feasible date.

The Subcommittee after careful review and study over an extended period of time, approved what is now Section 111 of S. 644 which contains an initial schedule of royalty rates, provides for the creation of a Copyright Royalty Tribunal to review and adjust royalty rates at periodic intervals, and establishes procedures for the collection and distribution of the royalty payments. It is my considered judgment that these provisions of Section 111 are eminently fair and reasonable and must be a part of any new copyright law.

With kind personal regards, I am

Sincerely,

JOHN L. MCCLELLAN,
Chairman.

Now, we find ourselves, Mr. Chairman, in a difficult position. We pledged our support to the consensus agreement, we gave our word, and we redeemed it. Cable systems got everything that was in that consensus agreement, but the key element, the key element that the copyright owners believed that would be honored was, in fact, not honored at all.

Now I could spend more time, but in the interest of time, I want to go on to what I consider to be another key point, Mr. Chairman, which is the inadequacy——

Senator McCLELLAN. The what?

Mr. VALENTI. The inadequacy of the fee schedule. I want to cite to you two crucial points—at least to perhaps our biased eyes—but I hope that an unbiased observer would feel the same way. We believe this fee schedule is neither adequate nor appropriate, now let me tell you why.

Point No. 1, we are not aware of any economic evidence of any kind that corroborates the fee schedule which is in S. 1361. To our knowledge, there has been no factfinding efforts of any find which preceded the insertion of that fee schedule in S. 1361. There is no kinship in these fees, in our judgment, sir, to the reasonable value of the copyrighted programs that we produce and go out on the air and whether or not these fees would reasonably compensate copyright owners for the expected loss of value in their programs. That is point No. 1.

Point No. 2, the complexity, the elaborate material, the tormenting detail that exists in setting a fee schedule, is enormous. It has been our conviction—in 20 minutes, I cannot even begin to make a comprehensive statement to you; I am not even sure it could be done in 20 hours. But the examination of a fair and reasonable fee schedule simply demands the full-time scrutiny of a body of experts.

That has been our contention, sir, and even if the fee schedules were higher, they would still be artificially based, without a solid base of facts or without a sturdy rostrum of research, and that is also our contention.

Now what we are advocating, Mr. Chairman, are fees that are just and reasonable; that is all. We believe that you cannot have just and reasonable fees unless you have a careful examination of all the undergirding facts on which you build your edifice of a fee schedule.

Now, there are many areas, sir, that we have not even begun to talk about. I want to bring to this subcommittee some of these variables; the location of the system; the number of signals it carries; the value of programs carried by the system; the size of the system; the penetration of its franchised areas; saturation of the television market in which it operates; the age and stage of development of the system; investments necessary to construct the facility; amortization of its capital investment; allocation of the investment in its plant to retransmission of broadcasts as contrasted and distinguished from other activities, and literally dozens of other variables that are inherent in the study of a fee schedule. I submit, sir, that this forum, fair and thoughtful as it is, is not equipped to deal with this mountainous task. It is just too much; it demands too much of busy Senators who have other duties.

That is why the arbitration tribunal was agreed upon in the first place in the consensus agreement. That is why it is indispensable, at the very outset, to set the standards, the procedures, and the painstaking attention to detail that this kind of fee setting deserves.

Now I also believe, and my colleagues believe that the arbitration tribunal is fair because it is beholden to neither side. I would not for one moment tell you that both NCTA and our groups are totally objective; of course we're not; we each have an ax to grind. Therefore, while I do believe the Senate is objective, I am saying that the Senate does not have the time—nor the House—to deal with this. Therefore, I would like to go to an objective body with the time to consider the detail.

When one looks at this bill, Mr. Chairman, they say, my goodness, at first blush, the large systems are going to pay a royalty fee or copyright fee of 5 percent. That is not true. This is a progressive rate schedule from 1 to 5 percent based on different levels of income in which the 1, 2, 3, 4, and 5 percent apply to these different levels.

That means, Mr. Chairman, overall this fee schedule yields an effective rate of 1.9 percent, and from this modest sum all—repeat all—copyright owners, film producers, broadcasters, music composers, all must share in that modest sum.

To put these figures in the proper perspective, let's see what they mean. The FCC published some data which is very pertinent. They pointed out in the year 1971, the individual television stations in this Nation paid $179 million in the year 1971 for the licensing of nonnetwork copyrighted material, $179 million. Now, if the fee schedule in S. 1361 had been in effect, in that same year cable systems would have paid for that same material $7.6 million.

Now by whatever standards or what measures you choose to lay down, we think that is grossly inadequate in a return.

Now the cable systems are economically viable and able to pay larger fees, surely larger than is in S. 1361, beyond any doubt as far as we are concerned. We have gone to the expense of commissioning a study by two distinguished economists, Mr. Fray of Temple, Barker and Sloane, Inc., and Dr. Crandall, associate professor of economics at MIT, to study, to find out the capability of cable systems today to pay fees tomorrow. I think this study graphically illuminates the fact that cable systems, even after deducting the 15 percent return on investment which any bank would be pleased to loan money on, I am sure, even on the deduction of the 15 percent royalty, there are considerable funds available to pay a higher fee, much higher than S. 1361.

Now, I don't have time, Mr. Chairman——

Senator McCLELLAN. Is that study in the material?

Mr. VALENTI. Yes, sir; it is in the brown cover.

I am hopeful, Mr. Chairman, because, if I may say a word within the timeframe that I have, I am not sure—I do not have time to discuss this; I am hopeful that you might see fit, sir, to ask some questions, pertinent questions about this study to bring out the source data and how it was developed and what it means.

Senator McCLELLAN. Well, I have not seen this study, and I did not have the opportunity to review it, but I am saying——

Mr. VALENTI. I cannot argue with you on that point.

Senator McCLELLAN. I'm saying to you, and all of you, I do not necessarily mean for this to be final, but in order to get the thing in motion again, we set these days, to give everybody a chance to present their views and as you know, of course, you have the right to submit rebuttal statements and whatever you want to. We are going to try to make a complete record.

But as you indicate, this seems to be a very, very complicated—and in fact, we know it is complicated—and we want again to bring the record up to date. That is what we are trying to do.

Now, if we did not limit it, limit the time to some extent, it would go on here for months and months. I am sure, when we get this record, we will try to have it reviewed and we may fill in some gaps, of course, if we need to.

Have you finished?

Mr. VALENTI. I have just about 2 or 3 minutes to go, Mr. Chairman.

Senator McCLELLAN. Go ahead. I will ask you a question or two after you have finished.

Mr. VALENTI. I was just going to say, we do not have time to present the study, but as you point out, it is in the record there, and I hope the committee will have a chance to examine it, and we might have a chance to expand on it some other time.

But, let me make a few concluding remarks.

One is that the overwhelming argument in favor of an arbitration tribunal is simply this, Mr. Chairman. You ask two questions: is it right and fair that a fee schedule should be set after an examination has been made of all the evidence, all the facts have been weighed in, all the variables have been tested and scrutinized; or is it right and fair that a fee schedule should be set artificially unaccompanied by facts or data whose numbers and arithmetic were plucked out of the air with no claims to study or to any factfinding procedure?

Well, the answer to those questions is quite obvious; that is why it makes good sense. And I wish I had more time, as I say, to discuss it.

I will make my final comment.

When this bill was first introduced by Senator McClellan, the Senator indicated that the cable television provisions in the bill would have to be reexamined in the light of evidence since December 1969.

I would like to respectfully submit to you, sir, that we have some suggestions for changes which the copyright owners consider essential, and there are four or five and I will go quickly through them.

The first is that the grant of compulsory license to cable systems with appropriate limitations on its scope be made. In our detailed statement to the committee, we have told you what we mean by this. The consensus agreement provides, Mr. Chairman, that the compulsory license shall be limited to "those distant signals defined and authorized under the FCC's initial package," of course with the local and grandfathered signals additionally. The retransmission by a cable system of distant signals beyond the compulsory license should be subject to full copyright protection. Further, as provided for in the consensus agreement, the FCC would not "be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings."

That is suggestion No. 1.

Suggestion 2 is a very important one, sir. We believe that the basis for the computation of fees should be spelled out. The statute should provide that in readjusting the fees, the tribunal should have broad powers to set and adjust the fees both with respect to the manner and method with which it is to be computed and the base on which the fees are to be assessed.

The third point, the language in the bill should be changed to provide that the arbitration tribunal shall make determinations concerning the adjustment of the copyright royalty fees as spelled out by section 111 so as to assure that such fees are just and reasonable. What this section says now is that such fees shall continue to be reasonable.

Well, if we're going to have S. 1361 as it is, then this must be that the fees must be adjusted reasonably, not to continue, because at this point we do not believe that they are reasonable.

No. 4, we need a clearer definition of what is a cable system; and 5, we need a reexamination of the overly broad governmental and nonprofit organization exemption.

Now, Mr. Chairman, I have taken about 16 minutes; and I would like to, in the remaining 4 minutes that is on our allotted time, I would like to have speak to you briefly a gentleman who represents the Screen Actors Guild, Mr. Chet Migden, who is executive secretary of the Screen Actors Guild. He also represents the I.A., which is the craft unions; and we are speaking for them in California and throughout the continental United States, and unofficially representing the Writers and Actors Guild. In short he represents the labor and technician and craftsmen community in the film industry in the United States. And I would like to have Mr. Migden, Chet Migden of the Screen Actors Guild.

Senator McClellan. Very well. We will be glad to hear him, but I would ask you two or three questions.

Mr. Valenti. Yes, sir.

Senator McClellan. Have you submitted in your document here a schedule of fees that you think proper?

Mr. Valenti. No, sir. We have not.

Senator McClellan. Do you wish to submit to the committee a schedule of fees that you think proper?

Mr. Valenti. Mr. Chairman, to be——

Senator McClellan. Somebody is going to have to look at some proposals, whether we do it or arbitrators or somebody else.

Mr. Valenti. Mr. Chairman, may I tell you very honestly the reason why we did not. This has been examined, and I must say I looked on it with some favor; but to be perfectly honest, we determined not to submit a specific fee schedule because of the result of our negotiations with Cable Systems. That schedule that we would submit to you then would become the floor or the ceiling, whichever one you choose to call it, from which new negotiations would begin.

We would be willing to submit a schedule of fees if Cable Systems would also submit their schedule of fees. They have not moved one jot off the 1.9 effective rate. We have made several attempts at compromise, and it has not gone forward.

We are just afraid, to be honest and not try to beat around the bush, if we submitted a schedule that would become basis for new negotiation, and we would constantly be pushed down. And there is no other reason, sir, why we have not.

Senator McClellan. It looks to me like somewhere, sometime each side is going to have to submit a proposal, either here or at the arbitrators. I do not see any way to avoid it, do you?

Mr. Valenti. Excuse me, sir.

Senator McClellan. Do you see any way ultimately to resolve it, unless the proposals of the conflicting parties of interest be submitted somewhere for evaluating.

Mr. Valenti. Yes, sir. I think with an arbitration panel, we would be obligated to submit what we think is a fee we ought to have, or at least to bring before the arbitration tribunal all the evidence showing expected loss of our programs, fractionalization of our audience, and how the values of our programs have decreased. And by submitting this long dossier of facts and figures, we might come forward with a fee schedule.

Senator McClellan. I agree with you that this is a very complicated thing. I do not know all the answers. I do not know anyone who does know immediately; but this has been a pending matter for quite a long time, and I assume, or am certain that the parties of interest would be able to give us some suggestions from their standpoint, something concrete for us to look at.

Mr. Valenti. Mr. Chairman, I could not agree with you more, but the realisms of the negotiating jungle tell us that we would be making a grave strategic error, because just as surely as night follows day, that fee schedule would become the basis for new negotiations; that would become the ceiling; and we would be pushed down and down and down.

And I feel like frankly, to be honest again, that we have made several attempts at compromising. I think that your staff and others have been aware of that each time we have not gotten anywhere, and indeed, it has ended our position without any attempt to gloss over it. As a matter of strategy, we felt like this would be wrong for us to do that.

Senator McClellan. It seems to me if both sides take the position that they do not want to submit anything for our consideration, for us to evaluate, it seems to me that we are going to be left here, if we do undertake to fix fees, just take something out of the air that appeals to us.

And I do not think after we do that, if we are not given the assistance, cooperation from those who are suggesting relief they want, if they do not give us something concrete to base it on, I do not think you have much justification for complaint.

Mr. Valenti. Mr. Chairman, responding to that, of course our contention has been that we have already submitted a proposal, and indeed, a proposal that was agreed upon at an earlier time by the cable systems; and that is, the insertion of the arbitration tribunal at the outset. That is really what the controversy has been about.

Senator McClellan. Well, that is one issue, and I am not excluding that issue. I am going to point out though that if the committee does undertake—I am not saying they will—but if they should undertake to establish fees, or temporary fees until arbitrators or some board, proper tribunal, could make a thorough investigation about what you suggest—until then, it would be well if we had some suggestions and reasonable basis for us to evaluate it.

I am not at the moment—I am not insisting that you do it. I am leaving it largely up to you.

Mr. Valenti. All right, Mr. Chairman.

Senator McClellan. All right. We will hear your next witness.

Mr. Valenti. Mr. Migden——

Senator McClellan. One other thing, Jack. Maybe you can be helpful on this.

Mr. Valenti. Yes, sir.

Senator McClellan. We have a problem in this connection, and I think maybe you should comment on it if you have not. I do not believe I heard you. You may have in your formal statement.

We have a request, only a request—it is kind of an urgent appeal, let's put it that way—from small cable TV systems that they be exempt, some of them. I had a wire this morning from Louisiana.

But they are requesting—I suppose you know that—that systems with 3,500 subscribers, and anything less than 3,500 subscribers, be exempt.

We of the committee have not as yet looked with favor on that. Some of them make a pretty strong appeal from the standpoint they just cannot afford it. I would like for you to comment on that, if you will.

Mr. Valenti. Yes. I would be pleased to, Mr. Chairman. A short historical background—in the give and take of hammering out a consensus agreement, one of the concessions that the copyright owners were pleased to make in order to have an arbitration tribunal at the outset, in return for that, one of the returns for that, we were willing to exempt from all copyright liability, assuming the arbitration tribunal went in at the outset, copyright fees from markets, from cable systems independently owned with less than 3,500 subscribers; independently owned, what we call the mom-and-pop type station.

Senator McClellan. And so there would be no objection on your part, as I understand it.

Mr. Valenti. Assuming that the arbitrational tribunal—

Senator McClellan. In other words, if you get your point on the other issues, you would waive that; otherwise, you do not.

Mr. Valenti. Yes, sir. That is essentially correct, Mr. Chairman. That was part of the construction that was built into the consensus agreement.

Senator McClellan. I know. I have been getting some wires and communications lately from the smaller systems, 3,500 and under; and I think you should speak to the point.

Mr. Valenti. Yes, sir. Did I respond to you all right, sir?

Senator McClellan. Yes. But I thought you should be given the opportunity to comment on it.

All right. Who is your next witness?

Mr. Valenti. This is Mr. Chet Migden again.

Senator McClellan. Mr. Midgen, all right, sir.

Mr. Migden. Mr. Chairman, I wish to thank the committee for according me this opportunity, and I will try to be brief, to appear before you. And I would like to thank Mr. Valenti for giving me a portion of his time to do this.

As this committee is aware, the motion picture industry is an industry that directly employs thousands of people and indirectly provides the payrolls for tens of thousands more.

The skills of those responsible for the production of films range from those of the actors, writers, directors, composers, lyricists, producers to those of the technicians on the sets and in the studios, the costume and wardrobe designers and makers, carpenters, painters, electricians, and all sorts of crafts and skills that make the motion picture possible.

All of these men and women depend for their livelihood on the income derived by the industry from various uses of the films produced. Specifically, their compensation depends on the copyright fees paid for the use of these films in theaters and on television.

For many years, collective bargaining contracts with all of the major motion picture producing companies and independent motion picture producers have been in existence, which provide minimum compensation and working conditions for the creative and technical personnel associated with the production of motion picture films.

With respect to films made specially for television and to series programs such as dramatic shows and situation comedies, the ones we see so much of on television, the compensation which these groups receive is directly geared to the number of times the films is replayed.

A similar system also applies to theatrical films sold for television exhibition, but the compensation in this case is geared to the producer's gross receipts from such exhibition.

Many years of study and effort have been expended by the different unions in negotiations with the producers to establish this system of compensation, and they have proved to be the fairest and most equitable way of compensating the creative and technical elements which contribute to the final film product.

Any copyright royalties collected by the producers and distributors of television programs from the cable television industry would add to the funds out of which this compensation is paid. Thus, the question before the committee today—namely, a copyright royalty schedule for the cable television industry—is of direct interest to the organizations I represent.

I understand that the cable television industry concedes that it should pay copyright royalties and that the only issue before the committee is how much those royalties should be.

In considering the perimeters of a fair and equitable copyright fee, I believe it is important to consider the compensation presently derived from the exhibition and replay of television programs by the unions. For example, for the year 1972 the compensation paid to Screen Actors Guild members for the television exhibition of theatrical feature films totaled something in excess of \$2¼ million. During the same period the compensation for residuals from the replay of features made for television and series programs totaled something in excess of \$12,875,000. If we add the other unions, writers and directors alone, you could double those figures.

Turning to the copyright fee schedule contained in S. 1361, the effective rate provided approximates 1.93 percent of the gross revenues of the cable television industry or approximately \$7.63 million based on figures for the year 1971.

This fee, however, would not be payable to only the motion picture producers. It would have to be shared by motion picture producers, networks, broadcasters, performing rights societies and many others.

In short, the portion allocable to the motion picture companies and thereafter by a further percentage reduction to the organizations I represent would be so negligible as to be meaningless.

More importantly, it would not come close to approximating the losses in revenues that the copyright owners would sustain, and thereby the unions would sustain, because of reduced license fees attributable to the ability of cable systems to retransmit television signals as permitted by the FCC.

Based upon these considerations, it is our sincere view that the present fee schedule should be revised. Of course, one method of achieving such a result would be to replace the present schedule with a different one.

We share the view, however, of Mr. Valenti, that the fairest approach to determining a just and reasonable license fee schedule is to submit the matter to binding arbitration between the parties. This is the method of determining the license fees that the parties agreed to under the consensus agreement, and it would be the most impartial method of determining an equitable fee schedule.

I can attest that in the contracts which the unions negotiate with the motion picture companies, which contain compulsory arbitration, have proven to be a most effective instrument for the settlement of comparable problems.

Accordingly, on behalf of the Screen Actors Guild and the other unions for which I speak, I urge that the fee schedule presently contained in section 111 of S. 1361 be deleted and that provisions providing for compulsory arbitration be substituted to determine a just and reasonable copyright fee schedule for the cable television industry.

Senator McClellan. Thank you very much.

Do you have anything further?

Mr. Valenti. Mr. Chairman, we have taken 20½ minutes, which is one-half minute more than you gave us; and we are grateful to you.

Senator McClellan. We have extended the time here. I have been asking questions. I have been doing that on our time, trying to help bring out points that I thought were essential to this record.

I would like to make one comment about your testimony where you say that you understand that the cable television industry concedes that it should pay copyright royalties an the only issue is the amount.

I may say to you that in the very beginning, even after the court decision that indicated maybe they were not liable for fees, as chairman of this committee and sponsor of this bill, I took the position that they should pay some fee.

The problem all the time has been the amount and originally the idea of placing these fees in there was to get something started. We have lost time, 2 years possibly, by not proceeding to get something established by law, and the machinery whereby it could be carried on.

From my viewpoint in the beginning that seemed fair, and it seemed like the right approach or the probable best approach since the parties were so far in disagreement, to bring this thing to a conclusion and get the problem resolved. Not to everybody's satisfaction, no. I do not anticipate that, nor will the arbitrators probably accomplish that miraculous feat.

But it was trying to make progress and move the thing, and once you get the system established under this bill—as it is now, you would have a constant review of adjustments being made. Maybe this is not the way you folks want to do it. This is not the way that anybody concerned wants to do it. But this approach was made with the sincere objective of trying to find the solution and put a solution in motion. That was our objective.

And my position from the beginning has been, and it is now, that they should pay some fees. Apparently, no one knows what is right. Some have different viewpoints about it, and somehow we are going to try to resolve that.

Mr. MIGDEN. I appreciate that, Mr. Chairman.

Senator MCCLELLAN. Mr. Valenti, this time I am using is not charged to you.

Mr. VALENTI. Thank you, Mr. Chairman.

Of course, you really got to the gristle of the problem, Mr. Chairman, on which we have diverged from the cable system, the NCTA, on the fact that these fees are nominal going in in order to get it started.

It has been our contention though that any fee, whether it is temporary or not, does have an enduring life of its own; and no matter what language you put in the bill saying it would not create precedent, and it is not intended to influence anybody, the facts of life, sir, is that it does.

And we believe that artificial fees, artificially set without factfinding, without any rostrum of research or arithmetic, is bound to impair fees that we think are just and reasonable.

And that is why we have strenuously objected to it. That is why we believe that the arbitration tribunal at the outset is the fairest method of doing it. And to this hour we have not heard from those who oppose the arbitration tribunal as to what are its liabilities.

Surely, an arbitration tribunal is fair and has more substance than artificial fees, and I say in all respect, sir, that is really the problem that I think you illuminated right there.

Senator MCCLELLAN. What about this royalty tribunal that we undertake to set up and establish in the bill?

Do you oppose that?

Mr. VALENTI. Oh no, sir. I am using royalty tribunal and arbitration tribunal interchangeably. Our objection to it, sir, is that it is 3 years too late; that it should have started at the very beginning because it must come in and begin adjusting artificial fees.

Now, let's suppose, Mr. Chairman, that the fee of 1.9 percent and the royalty tribunal thought it ought to be 5.7 percent; that would be a 300 percent increase.

Now, you can imagine the cries of anguish that would be set up all over this country saying you cannot increase my fees 300 percent, for God's sakes. So no matter what fee you put in, if it is artificially constructed, it throws a tarnish over the whole system of fee schedule.

Senator MCCLELLAN. I do not think it would if we had a little more help from the parties of interest as to what the right fee is. We do not have that.

Mr. VALENTI. Yes, sir. I have to agree with you on that, but even so, what we think is the right fee may not be what the NCTA thinks is a right fee. As I said, there is bias on both sides; and I admit that very plainly, sir. And I would not expect my views to be taken as infallible by the NCTA or vice versa.

That is why it seems so plain to us that the arbitration tribunal has been shorn of all these liabilities. It is objective. It has no bias. It is not devoted to either side. And therefore, we believe it is fair.

Senator MCCLELLAN. Well, as you point out, how long do you think it would take a tribunal, either a board of arbitrators or the tribunal that we have undertaken to establish in this bill, how long do you think it is going to take them to evaluate and come to a decision?

Mr. VALENTI. I am giving you a guess, Mr. Chairman—maybe slightly educated, but not a graduated guess. I would say that 6 months to a year you would be able to, with a full-time scrutiny body of experts looking and lingering over this thing every day, I believe they could come forward with some conclusions, obviously, that we would all accept. And whatever conclusions that came up, even if we did not like them, we would have to admit that they were objectively and satisfactorily arrived at.

And as you know, Mr. Chairman, one of the compromises that we brought forward to the NCTA was a year's free period after the passage of this bill in which the arbitration tribunal would be making its decision making work for 1 year; and then the fees would be settled on, and then you would go forward as in section 111 which a 3-year adjustment and a 5-year adjustment.

But I have been unable to see why that is unfair. We think it is fair, sir.

Senator MCCLELLAN. All right.

Senator Burdick.

Senator BURDICK. I am sorry that my multiplicity of duties around here prevented me from being here while you gave your testimony. I would like to say at this time that I will read it very carefully, and appreciate your being here.

Mr. VALENTI. Thank you, sir.

Senator MCCLELLAN. Thank you, gentlemen.

Mr. BRENNAN. Just one question, Mr. Chairman, as you anticipated most of my questions.

Mr. Valenti, movie companies and program producers have an interest in other sections of the bill, in addition to section 111; and it might be constructive to compare the positions taken by movie companies and program producers on other sections of the bill with your testimony this morning. I am referring primarily to section 115 on the mechanical royalties and section 114 on the performance royalties. Is it not correct that motion picture companies have testified in support of the Congress establishing fee schedules for both of the sections?

Mr. VALENTI. That is very true. But there is a different reason for that, Mr. Brennan. There is a great difference between records and television movie programs; one is fungible and the other is not. Indeed, the more often you play a record, the more popular it becomes; the more often you play a television program, the less valuable it becomes.

So the difference between a set royalty fee on a record, performing of that kind is vastly different from a fee set on a television series or a motion picture; because the more you play that picture on television, the less valuable it becomes.

The converse is true with records, as any radio station or record company will readily testify.

Mr. **Brennan.** I thank you, Mr. Valenti.

Senator **McClellan.** All right.

Senator **Burdick.** Mr. Chairman, I have a question that I am going to ask several witnesses during the hearing today. I think I will give it to you, too.

Mr. **Valenti.** All right, sir.

Senator **Burdick.** I want something in the record. In four areas, S. 1361 statutorily sets the rate for use of copyrighted materials—sections 111, 114, 115, and 116. Why is it necessary to involve Congress in this process? The copyright grant is monopolistic in nature, but so is the patent grant.

Congress makes no effort for separate use of patent items, while the courts have done so in the case involving the use of patent grants.

What is the rationale for treating the copyright in this fashion?

Mr. **Valenti.** What is the rationale of why Congress should set a fee? I will answer in the following way, Senator Burdick. I do not question the authority of the Congress to do whatever it chooses to do in the obligation it has to its duties.

We said that the Congress ought not set fees for two varying reasons. One is that the Congress does not have the expertise or the time to sit in judgment on the vast amount of evidence that must be presented. And that therefore, the Congress ought to turn this over, as it had done in many other areas, to an arbitration or royalty tribunal, or whatever you choose to call it; a body of experts working full time on the issue.

Now, do any of my colleagues have any additional comments to that? Gerald Meyer or Herbert Stern?

Mr. **Stern.** No.

Mr. **Valenti.** That has been our contention from the outset, Senator Burdick, that the Congress ought not to do it.

Senator **Burdick.** Well, I am just searching for information.

Mr. **Valenti.** Because as I said earlier in my brief presentation to the subcommittee before you arrived, was that the detail, the mingling of facts and figures and the varying items—variables, I called them—in going to the management of some kind of a fee schedule, the construction of it is so varied that you cannot do it in a 20-minute or even a 20-hour session. It takes a body of experts working full time to do this.

And this is a terribly complex thing, this cable system and fee schedule, as both the NCTA and copyright owners will testify. We have been working at it for 60 hours, and I do not know that we have really hit bottom on it yet.

Did you have something to add to that, Gerald Meyer, our counsel?

Mr. **Meyer.** Yes, if I may. It has always been the position of the copyright owners that the copyright question concerning cable systems could be treated in the same manner as that of other users of copyright works; that is, full copyright protection.

The cable interests have contended that this was not possible because of administrative difficulties. It was in order to break this deadlock, Senator, that the copyright owners have conceded in the consensus agreement that as part of a package deal, they would be agreeable to support a compulsory license which would take care of the concerns of the cable industry about clearing copyrights. But that in return, there should be compensatory license fees paid under that compulsory license, which is very unusual.

It does not exist in many other fields like the patent, which, Senator, you mentioned.

Now, there was a question, suppose the parties do not agree on what is a reasonable copyright fee under the compulsory license; and so again, as part of this package consensus agreement, it was said that if the parties cannot agree, then in the absence of a free market, where the price can be determined, there should be arbitration or this tribunal, which would set these rates. And that is how we got to the compulsory license and to the arbitration question.

Senator Burdick. Well, I will carry this out. Why do we not leave it to the free market completely?

Mr. Meyer. The copyright owners would certainly be in agreement. Having pledged their word and honor on this consensus agreement, they do not feel they should go back on their word.

Mr. Valenti. The answer is, of course, this ought to be in the free marketplace, Senator, just as all other copyrighted material is bargained for at the marketplace. But as Mr. Meyer pointed out, we did enter into an agreement. We pledged our support to it. We never wavered in that support, even though possibly we got a bad deal going in. But we signed it, and we honored it, and we stick by it.

Senator Burdick. This is the so-called consensus agreement?

Mr. Valenti. Yes, sir.

Senator Burdick. And you are willing to honor it?

Mr. Valenti. Yes, sir.

Senator Burdick. Thank you.

Senator McClellan. From a practical standpoint, is it possible to make agreements on each show with all of these stations?

Mr. Valenti. I will let my expert answer this.

Senator McClellan. I just take it from a practical standpoint.

Mr. Meyer. In a way, Senator, this is water over the dam, but from a practical point of view, the copyright producers make license fees, arrange for license or license fees with many hundreds of television stations. I think there are 700.

Senator McClellan. The point is the CATV station picks up somethink that is being broadcast somewhere else. He has no way of knowing what is going to be broadcast ahead of time.

How can he make an agreement with each copyright proprietor with respect to each particular show? I do not see how from a practical standpoint it can be done. Maybe I am wrong.

Mr. Meyer. It is difficult but it can be done. It is being done for hundreds of thousands of musical compositions which are given by——

Senator McClellan. I do not see how it can—the cable system does not have anything to do with what the broadcaster is going to buy and produce and so forth, and what he is going to pick up.

Maybe it is practical. Just tell me it is. If it is for the copyright proprietor and the CATV station in each instance to make a contract before that show as to what percentage or fee he will pay for rebroadcasting.

Mr. Valenti. Mr. Chairman, I think I will step in to say I think it might be difficult, but I think it can be done. My colleague——

Senator McClellan. I do not see how it could be profitable. There would be such an expense involved in either way.

Mr. Valenti. Excuse me, sir. My colleague, Mr. Stern, informs me that ASCAP does this with local stations. They are bargaining with them for music, not records but for music. And I think it is possible for a copyright owner to work out with cable systems in the free marketplace, this kind of an arrangement.

But as Mr. Meyer said, we have already stipulated.

Senator McClellan. Well, have they undertaken to do that in any instance that you know of? You have had this problem for years, at least until the Supreme Court indicated that there was no liability for CATV owners. I do not mean with the legal aspects of that case, but from the moral aspect of it. I thought, the copyright people did have the proprietary interest; and that some compensation should be provided for it.

Now, maybe we can step out of the picture and maybe——

Mr. Valenti. I think as of this point, 10 years I think the cable has been in operation. I think they have paid zero dollars for copyrighted material.

Senator McClellan. Well, I wonder if you have worked out any arrangement. Have you tried it? What I am talking about——

Mr. Meyer. We have tried, Senator, to approach the subject years ago; and the cable people indicated to us that they were unwilling to make any payments, and they would take their chances with the Supreme Court *Fortnightly* case. And the Supreme Court, as you know, has said that local signals are not subject to copyright; and we are in the same position as to distant signals now where the court of appeals has settled that in the *CBS* v. *Teleprompter* case.

Senator McClellan. Personally, I would like for the problem to go away; apparently it is not going to go away. We are going to have to try to approach it and get some solution to it for the benefit of the parties of interest and also for the viewing public.

Mr. Valenti. Well, Mr. Chairman, one final response. I agree with Senator Burdick that the crux of this is that the free marketplace ought to be the determinant as to what a man pays for a product he chooses from a supplier. And, indeed, that is the way the cable operates on everything that goes into its system. It buys at a bargain price or price that is set by its suppliers for everything that they use, except one, their copyrighted material, which is the gristle of their business.

But in the absence of the free marketplace and because we have agreed in the consensus agreement—we have said OK; we have pledged our word that we would go through with the compulsory license, if we had failing agreement on fees, an arbitration tribunal.

The final point I want to make, Mr. Chairman, is I have spoken of the consensus agreement numerous times; but to this hour we receive no benefits from it because all of the benefits have flowed to the cable system—that paragraph (d) the last paragraph, which was the triggering, generating effect for the arbitration tribunal has never been implemented.

And I do not understand why the cable people do not believe that the arbitration tribunal is fair, because we do not own them. We do not care who picks them. We do not know who they are. But we are willing to take our chances with fair, objective men setting these fees, then we will live by them, just as we have honored every provision of the consensus agreement to this very meeting.

Senator BURDICK. Mr. Chairman, I just want to correct the statement. I have taken no position on this. I merely asked a simple little question is all I did.

Mr. VALENTI. Well, let me say in answer to Senator Burdick's question, I will preface that.

Senator BURDICK. As I understand the justification and rationalization is first, you have got a complex situation, as the chairman has mentioned; and second, you are already bound to a consensus agreement, is that the basis?

Mr. VALENTI. Yes, sir. And we are willing to live by it.

Senator MCCLELLAN. I thank you very much.

Mr. VALENTI. Thank you very much.

[The prepared statement of Mr. Valenti follows:]

STATEMENT OF JACK VALENTI, PRESIDENT OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC., AND OF THE ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC., ACCOMPANIED BY GERALD MEYER, COUNSEL.

My name is Jack Valenti. I am the President of the Motion Picture Association of America, Inc., commonly referred to as MPAA, and of the Association of Motion Picture and Television Producers, Inc., commonly referred to as AMPTP. MPAA is a trade association whose membership comprises companies which are among the largest producers and distributors of copyrighted motion pictures in the United States.[1] The membership of AMPTP which is a California membership corporation comprises 72 companies[2] engaged in the production of copyrighted motion pictures for theatrical exhibition and for television broadcasting, and of series specially produced for telecasting.

I also appear here for the Committee of Copyright Owners, commonly referred to as "CCO". CCO is an ad hoc committee formed by producers and distributors of filmed and taped copyrighted television programs[3] formed in order to coordinate their efforts in resolving the CATV-copyright issue and various regulatory issues concerning the importation by cable systems of programs from distant television stations and the resulting duplication of programs telecast by local stations. The membership of CCO comprises only the independent suppliers of copyrighted television programs but not the networks, television stations, music performance societies or other owners of copyrighted works. However, the programs supplied by members of CCO to stations and thereby to cable systems, constitute by far the largest part of all copyrighted programs carried by television and cable.

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[1] Allied Artists Pictures Corporation, Avco Embassy Pictures Corp., Columbia Pictures Industries, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Pictures, a division of Universal City Studios, Inc., and Warner Bros. Inc.

[2] The following companies constitute the membership of AMPTP: Aaron Spelling Productions, Inc., A&S Productions, Inc., (The) Alpha Corporation, American International Productions, a California Corporation, Artanis Productions, Inc., Aubrey Schenck Enterprises, Inc., Bing Crosby Productions, Inc., Brien Productions, Inc., Bristol Productions, Inc., Charleston Enterprises Corporation, Cinema Video Communications, Inc., Chrislaw Productions, Inc., Columbia Pictures Industries, Inc., Daisy Productions, Inc., Danny Thomas Productions, Darr-Don Inc., Edprod Pictures, Inc., Filmways, Inc., Formosa Productions, Inc., Four Star International, Inc., Frank Ross Productions, Geoffrey Productions, Inc., Gilbraltar Productions, Inc., Hanna Barbera Productions, Inc., Harold Hecht Company, Herbert Leonard Enterprises, Inc., Jack Chertok Television, Inc., Jack Rollins and Charles H. Joffe Productions, (The) Kappa Corporation, Lawrence Turman, Inc., Legaria, Inc., Leonard Films, Inc., Levy-Gardner-Laven Productions, Inc., Lucille Ball Productions, Inc., (The) Malpaso Company, Max E. Youngstein Enterprises, Inc., Meteor Films, Inc., Metro-Goldwyn-Mayer Inc., Metromedia Producers Corporation, Millfield Productions, Inc., (The) Mirisch Corporation of California, Mirisch Films, Inc., Mirisch Productions, Inc., Motion Pictures International, Inc., Murakami Wolf Productions Inc., NGC Television Inc., Norlan Productions, Inc., Oakmont Productions, Inc., Paramount Pictures Corporation, Pax Enterprises, Inc., Pax Films, Inc., Rainbow Productions, Inc., Rastar Enterprises, Inc., Rastar Productions, Inc., RFB Enterprises, Inc., R.F.D. Productions, Robert B. Radnitz Productions, Ltd., Sheldon Leonard Productions, Sid & Marty Krofft Television Productions, Inc., Spelling-Goldberg Productions, (The) Stanley Kramer Corporation, Stuart Millar Productions, Inc., Summit Films, Inc., T&L Productions, Inc., Tandem Productions, Inc., Thomas/Spelling Productions, Twentieth Century-Fox Film Corp., Universal City Studios, Inc., Walt Disney Productions, Warner Bros. Inc., Wolper Pictures, Ltd., Wrather Corporation.

[3] Columbia Pictures Industries, Inc., MCA, Inc., Metro-Goldwyn-Mayer Inc., Metromedia Producers Corporation, Paramount Picture Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation and Warner Bros. Inc.

CCO has negotiated a settlement with the cable system operators and broadcasters regarding the retransmission by cable systems of broadcasts containing copyrighted programs. In this settlement which was incorporated into a formal written "Consensus Agreement" (Appendix I attached hereto), the representatives of the cable, broadcasting and program production industries pledged themselves to support full implementation by the Congress and the Federal Communications Commission ("FCC") of all of the provisions of said settlement agreement. With respect to copyright fees the settlement provided that if the parties should be unable to agree on the amount of license fees payable by cable systems this issue should be settled by arbitration.

Promptly after the settlement was signed, the FCC implemented the agreement and issued new regulations (47 C.F.R. §§ 76.51 et seq.) giving wide freedom to cable systems for the importation of distant signals but when copyright owners and cable operators failed to agree on copyright fees the cable industry repudiated the pledge contained in the Consensus Agreement that in the event of such disagreement the parties would support the insertion of an arbitration clause into the bill. As a result the copyright owners are still unable to collect license fees for the use of their films by cable systems, and are faced with a statutory schedule of fees in the bill. S. 1361 which as I shall demonstrate hereinafter, is wholly inadequate to provide just and reasonable compensation to the copyright owners for the value of their programs and for the losses suffered by them from the importation of distant signals.

Seated next to me here is Mr. Gerald Meyer a member of the law firm of Phillips, Nizer, Benjamin, Krim & Ballon, counsel to CCO.

There are also present in this room at my request, Dr. Robert W. Crandall, Associate Professor of Economics at the Massachusetts Institute of Technology and Mr. Lionel L. Fray of Temple Barker & Sloane, Inc., Management and Economic Counsel. These two gentlemen are the authors of the study commissioned by CCO entitled "The Profitability of Cable Television Systems and Effects of Copyright Fee Payment." Professor Crandall and Mr. Fray are available to the Subcommittee in the event that members of the Subcommittee may wish to address questions to them regarding the economics of cable television and of the distribution of programs in the television markets of the United States.

I am grateful to the Committee for the privilege of testifying today and for the opportunity to state the position of the associations and groups of copyright owners for whom I am authorized to speak. We welcome the instant hearings and the resumption by the Subcommittee of its work on copyright law revision.

Indeed, the delay in the adoption of the Copyright Revision Bill for more than a decade combined with the slowness of the judicial process in establishing the right of the creators of copyrighted programs to collect under the present law, royalties from cable systems which use these programs for their commercial profit, has caused grievous injury to all those whose talents and investments have produced these programs.[4]

The motion picture industry of the United States makes the films which are shown in more than fourteen thousand motion picture theatres throughout the country as well as the majority of the programs broadcast by almost 700 commercial television stations. It is an industry directly employing thousands of people and indirectly providing the payrolls for tens of thousands more. The skills of those responsible for these programs range from those of the actors, writers, directors, composers and producers to those of the technicians on the sets and in the studios, the costume and wardrobe designers and makers, carpenters, painters, electricians, teamsters, warehousemen and office and professional personnel. All of these men and women depend for their livelihood on the income derived by the industry from various uses of these programs. Their compensation depends on the copyright fees paid for the use of these films in theatres and on television, and, insofar as television series are concerned consists to a large extent of "residuals", i.e. of payments for each showing (run) of a series subsequent to its original run.

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[4] The CATV Copyright controversy covers solely the retransmission by cable systems of programs broadcast by television stations for which the cable system charges its subscribers a fixed monthly charge. When cable systems "originate" their own programs or make a separate program or a per channel charge (Pay-TV or Pay-Cable), their copyrightliability is admitted by all concerned.

I want to emphasize at the outset: the Program Suppliers are not anti-CATV. On the contrary, CATV systems represent important potential customers for television programs and, hopefully, an ultimate source of considerable revenue. In the public interest, as well as in their own self interest, all copyright owners look forward to a prosperous CATV industry. It is the desire of the copyright owners, therefore, to be as constructive as possible and to support the efforts of this Subcommittee in dealing effectively with this immensely difficult problem.

Both as a matter of economic necessity and of social fairness to those who produce the programs, it simply is wrong that the cable industry which reaps substantial profits from the use of the productive creations and investments of others should be permitted to remain outside of the program distribution market and to charge its subscribers $60 to $70 or more each year for transmitting to them a product for which—so far—they have paid nothing, and to do so in competition with the producers' paying customers, the television stations. I am glad to add that the cable industry concedes that it should pay royalties. Where we disagree, principally, is how much it should pay.

I. HISTORICAL BACKGROUND

1. *Copyright Liability of Cable Systems under the 1909 Act*

Television today is a major user of copyrighted film programs. Before a television station broadcasts a copyrighted program, it must secure a license from the program's owner. The cable television segment of the television industry, on the other hand, picks up programs broadcast by television stations both nearby and far away and, for a monthly charge, retransmits them to individual set owners over wires or cables. Up to now CATV, while diverting income from television stations, has escaped making payments to copyright owners even though it uses the copyrighted films for profit

The 1909 Copyright Act of course did not anticipate modern technology and novel methods of communication. Thus in *Fortnightly Corp. v. United Artists, Inc.*, 392 U.S. 390 (1968), the Supreme Court fo the United States held that the unlicensed use of essentially local broadcasting signals by community antenna systems which neither originated programs nor used microwaves and which were merely "well located" antennas enhancing the viewer's capacity to receive the broadcaster's signals, did not constitute a copyright infringement within the terms of the Copyright Act of 1909. On the other hand, in *Columbia Broadcasting Systems, Inc., against Teleprompter Corp.*, 476 F. 2d 338 (1973) (2 Cir., 1973) the Court of Appeals for the Second Circuit held that the retransmission of programs from *distant* stations, constituted a copyright infringement. The court said:

". . . we no longer have a system that 'no more than enhances the viewer's capacity to receive the broadcaster's signals.' Fortnightly, p. 399, 158 USPQ at 5. We hold that when a CATV system imports distant signals, it is no longer within the ambit of the Fortnightly doctrine, and there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it. For this reason, we conclude that the CATV system is a "performer" of whatever programs from these distant signals that it distributes to its subscribers."

The defendant in the Teleprompter case has petitioned the Supreme Court for a writ of certiorari regarding the Court of Appeals' holding that CATV is liable when it imports distant signals.

2. *The Consensus Agreement*

In 1965 and 1966, the FCC prohibited cable systems from importing programs from distant stations into the top 100 television markets on the ground that such importations would impair local broadcasting, would blanket the country with signals from the superstations in New York, Chicago and Los Angeles and would be unfair to program producers and broadcasters in that stations have to negotiate and pay for the programs while cable systems deny their copyright liability under the 1909 statute.[5]

During the Fall of 1971, Mr. Dean Burch, Chairman of the FCC, and Dr. Clay T. Whitehead, Director of the Office of Telecommunications (OTP), sponsored negotiations between representatives of the industries principally involved in the controversy, i.e., cable operators, broadcasters and copyright owners. The deadlock among the cable industry—which felt that its expansion was unduly limited by the FCC's restrictions on the importation of distant signals—the broadcasters—which felt that it was unfair to permit cable systems to carry the same programs as they do without having to bargain and pay for them—and the copyright owners—who wanted to put an end to the use of their product without receiving royalties therefrom—was broken by all parties consenting to the "Consensus Agreement" of November, 1971. This Consensus Agreement was accepted and signed by the National Cable Television Association (NCTA), the National Association of Broadcasters (NAB), and the Committee of Copyright Owners (CCO).

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[5] Second Report and Order, Community Television Systems, 2 FCC2d 725 (1966). See also First Report and Order, 38 FCC 683 (1965).

Under the Consensus Agreement (Appendix I), most of the distant signal carriage restrictions imposed by the FCC on cable systems were to be lifted. CATV systems were to be permitted to import programs from distant stations subject to certain limitations depending on the size of the market into which the importation was to take place and subject to the non-duplication by cable systems of programs available in the same market from local television stations.

Furthermore, the parties to the Consensus Agreement pledged themselves "to support separate CATV copyright legislation as described [in the Consensus Agreement], and to seek its early passage". The copyright legislation to be supported by the parties according to the Consensus Agreement would include "liability to copyright" and a compulsory license to cable systems to retransmit copyrighted programs without negotiating with the owners of the programs. The compulsory license was to cover all local signals as well as a certain number of distant signals authorized "under the FCC's initial package" (which initial package was described in the Consensus Agreement). Signals carried by cable systems at the time the Consensus Agreement goes into effect were to be "grandfathered" and independently owned systems then in existence with fewer than 3,500 subscribers were to be omitted from liability to copyright.

One of the essential controversies which the Consensus Agreement was intended to solve, was the question of fees payable to the copyright owners under the compulsory license. Since the copyright owners had found the fee schedule which had been first set forth in the committee print of December, 1966 of the Copyright Revision Bill S. 543, 91st Cong., 1st Sess., wholly unsatisfactory, an increase in the amounts of these fees had been the subject matter of fruitless discussions between the parties. It was because of the wide divergence of views between the parties on this point that the Consensus Agreement specifically provided for an alternative method of setting these fees in the event that the parties should be unable to agree thereon. More specifically the Consensus Agreement provided:

> "Unless a schedule of fees covering the compulsory licenses or some other payment mechanisms can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, *the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.*" (Italics supplied)

This Consensus was found to be in the public interest both by the FCC and by the Chairman of the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary. Thus, in the Cable Television Report and Order, 37 Fed. Reg. 13843 (1972) par. 65, the FCC said in adopting its new cable rules:

> "We believe that adoption of the Censensus Agreement will markedly serve the public interest:
>
> > "(i) First the agreement will facilitate the passage of cable copyright legislation. It is essential that cable be brought within the television programming distribution market. There have been several attempts to do so, but all have foundered on the opposition of one or more of the three industries involved. It is for this reason that Congress and the Commission have long urged the parties to compromise their differences.
> >
> > "(ii) Passage of copyright legislation will in turn erase an uncertainty that now impairs cable's ability to attract the capital investment needed for substantial growth. . . .
>
> "It is important to emphasize that for full effectiveness the Consensus Agreement requires Congressional approval, not just that of the Commission. The rules will, of course, be put into effect promptly. Without Congressional validation, however, we would have to re-examine some aspects of the program. Congress we believe will share our conclusion that implementation of the agreement clearly serves the public interest." (See exchange of letters between Chairman Burch and Senator McClellan attached as Appendix E)

In the letter to the Chairman of the FCC dated January 31, 1972 and incorporated as an appendix into the FCC's report on the new rules,[6] Senator McClellan, Chairman of the Subcommittee on Patents, Trademarks and Copyrights, said:

"As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties."

A copy of said letter is attached hereto as Appendix II.

Promptly after the adoption of the Consensus Agreement the negotiating committees of CCO and of the National Cable Television Association (NCTA) met in order to work out a mutually satisfactory license fee schedule. These meetings, however, did not lead to an agreement between the parties as to the amount of fees.

On the other hand, the lifting by the FCC of the restrictions on the importation of distant signals contemplated by the Consensus Agreement was implemented by the Cable Television Report and Order and a set of regulations was released by the FCC on February 3, 1972 to become effective on March 31, 1972. In said Report and Order (Dkt. No. 18397A, par. 64) the FCC stated that "if, as we judge, the terms [of the Consensus Agreement] are within reasonable limits and the agreement is of public benefit, then it should be implemented in its entirety".

On February 14, 1972, Mr. John Gwin, Chairman of the Board of the NCTA addressed a letter to Mr. David Horowitz, Chairman of CCO, pointing out that the Consensus Agreement obligated all of the agreeing parties to support implementation of all of the provisions of the Consensus Agreement and requesting the support of CCO in opposing any reconsideration of the FCC's Report and Order's unfreezing the carriage of distant signals. This letter was answered by Mr. Horowitz on February 18, 1972 expressing full accord with the need to support implementation of all of the provisions of the agreement and requesting that NCCA support its provisions dealing with arbitration of license fees in view of the parties' fruitless efforts to agree on a fee schedule. A copy of that correspondence between Mr. Gwin and Mr. Horowitz is enclosed herewith and marked Appendix III.

Subsequent to the exchange of this correspondence, Mr. Horowitz advised Chairman Burch that in view of the fact that all parties had agreed to support copyright legislation and in view of the exchange of letters between Chairman Burch and Chairman McClellan, CCO was satisfied that legislation would be promptly enacted implementing the Consensus Agreement and that accordingly, CCO in order to break the deadlock and enable CATV to build its facilities in the major markets, would not ask for a delay in the becoming effective of the new FCC rules but would support them in reliance on the compromise struck between the interested industries.

3. The "Unfreezing" of Distant Signals and Subsequent Repudiation by NCTA of the Arbitration Clause of the Consensus Agreement

The new FCC rules went into effect on March 31, 1972 and the "unfreezing" of the restraints on the importation of distant signals resulted in a spectacular expansion of the cable industry. According to a report in CATV weekly magazine of May 7, 1973, based on official FCC statistics, the "cable television industry recorded a one year jump of 21.5% in subscribers served and 24.6% in operating systems between January 1, 1971 and January 2, 1972." The same statistics reveal that the industry served 6,085,532 subscribers on the 1st of 1972 compared with 5,008,580 a year earlier. Comparative figures for the number of communities served by systems for the same period are 5,006 in 1972 compared to 4,017 in 1971. This trend was accelerated during 1972 and 1973 although it has not as yet been fully reflected in the available statistics. In data published in the Television Factbook No. 43 and the addenda thereto published in Television Digest, it appears that as of the beginning of 1973 the number of subscribers served has further increased to 7,300,000, and that the number of communities serviced as of July 26, 1973 had risen to 6,010

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[6] Appendix E annexed to the FCC's Cable Television Report and Order, 37 Fed. Reg 13848 (1972).

After the cable industry had thus received substantially all of the benefits provided for it by the Consensus Agreement and while it enjoyed an explosive growth in its newly gained freedom, the attitude of its negotiators for the license fees payable to copyright owners stiffened notably as soon as the regulatory restraints were removed. Indeed, since that time and in spite of the inability of negotiators for NCTA and CCO to agree on a fee schedule, NCTA has shown an increased reluctance to support the arbitration clause of the Consensus Agreement.

This does not mean that the efforts to reach agreement on a fee schedule were suspended. For most of the year of 1972, representatives of CCO and NCTA labored through long detailed and exhausting sessions, consuming hundreds of man-hours, both at plenary and at technical subcommittee meetings of experts, in an attempt to find agreement on a fee schedule. Notwithstanding these efforts the parties were unable to reach such agreement.

In July, 1972, the representatives of CCO and NCTA determined that if no agreement on a fee schedule was reached by September 30, 1972, the negotiations would be terminated. This deadline was extended several times until the last meeting between these representatives on November 6, 1972 at which time both sides expressed the view that the gap between the positions of the parties as to what fees would be reasonable, continued to be so wide that further negotiations on a fee schedule would be senseless. CCO thereupon proposed an arbitration procedure for insertion into the bill to implement the Consensus Agreement in this respect.

At the conclusion of said meeting of November 6, 1972 the NCTA Committee stated that it would consider CCO's proposal and submit it to its executive committee at a meeting to be held on November 20, 1972. The NCTA negotiators further promised to advise CCO immediately after said meeting of its executive committee as to what its response to the CCO proposal would be in view of the need for speedy action because of the impending consideration of the copyright bill in the Congress. NCTA however failed to advise CCO of its executive committee's response to the arbitration proposals discussed at the November 6 meeting.

Upon inquiry from CCO, NCTA advised CCO that the response would have to await the meeting of the full NCTA Board on December 13 and 14, 1972. On December 16, 1972, I talked with the President of the NCTA. He told me that NCTA had decided not to accept the copyright owners' proposal. CCO's proposal, he said, was referred back to the NCTA negotiating committee, and they would submit a counter proposal to us. That proposal, however, was never submitted. At about the same time the Chairman of the NCTA negotiating committee, Mr. Alfred Stern, advised the Chairman of the CCO negotiating committee, Mr. David Horowitz, that the NCTA Board has rejected the proposal of CCO for the arbitration and that it would not submit any counter-proposals on the subject since it was unwilling to support arbitration regardless of the provisions of the Consensus Agreement and that NCTA would support instead the fee schedule contained in § 111 of the Committee Print of December, 1969 of S. 644.

The copyright owners find themselves in a situation now where they have made substantial concessions in a compromise which has been implemented only insofar as the major benefits for the cable industry are concerned but where the reciprocal promises made by the cable industry have been repudiated unilaterally by NCTA.

II. THE INADEQUACY OF THE FEE SCHEDULE IN S. 1361

The fee schedule of § 111(d)(b) of S. 1361 first appeared in the committee print dated December 10, 1969 for a predecessor bill (S. 543, 91st Cong., 1st Sess.). An earlier predecessor bill, HR 2512 (90th Cong., 1st Sess.), had provided for negotiations between copyright owners and cable systems with penalties of loss of royalties or a trebling thereof in the event of unreasonable demands or offers. The fixed-rate schedule was thereafter inserted into the aforesaid committee print, into the successor bill S. 644 and into the present bill, S. 1361, without any prior hearings on the reasonableness of this schedule.

We are not aware of any economic evidence before the Subcommittee prior to the insertion of the fee schedule or of any fact-finding effort to ascertain whether the scheduled fees would correspond even approximately to the reasonable value of the use of their programs by cable systems and whether they would be reasonably compensatory of the losses expected to be suffered by the copyright owners. In fact, these fees are grossly inadequate and represent only a small fraction of what the copyright owners feel would be fair and compensatory fees.

Attached hereto and marked Appendix IV is a computation based on the fee schedule contained in § 111 indicating that the fees payable by the cable industries for the year 1971 pursuant to that schedule would have amounted to a total of only $7,630,000. If an exemption of systems with less than 3,500 subscribers had been applied (see below under III 5.), this amount would have been even lower. These license fees would have to be shared by program suppliers, networks, broadcasters, music performing societies, and others. Indeed while § 111 at first sight gives the impression that cable systems with large revenues would pay a royalty rate of 5%, the progressive rate from 1% to 5% in reality yields license fees at an effective rate of only 1.93% of the gross revenues of the cable industry. This low effective rate results from the fact that the scale of marginal rates progresses in successive steps from one to five percent based on quarterly revenue segments of the systems. Thus, even large systems with huge revenues pay less than 5% because the 1% royalty applies to their first segment of $40,000 of their quarterly revenues, 2% to the next $40,000, etc. so that the 5% royalty is applicable only to that segment of their revenues which is in excess of $160,000 quarterly of $640,000 annually.

To put these figures into perspective, it should be mentioned that according to FCC published figures the total broadcast revenues for the television industry during 1971 amounted to $2,750.3 Million Dollars while total programming expenditures amounted to 1,488.5 Million Dollars or a ratio of $54.1%. During that same year the cable industry with gross revenues of about 400 Million Dollars would have paid $7,630,000 under the schedule of § 111 (and even less if an exemption for small systems had been applied) or less than 2% of their gross revenues. (See Appendix IV).

That the cable industry is economically well able to pay much larger fees has been demonstrated in the aforementioned study entitled "The Profitability of Cable Television Systems and Effects of Copyright Fee Payments" by Robert W. Crandall and Lionel L. Fray, 1972. Copies of said study accompany my instant statement as a special appendix. In said study it is shown that cable systems could afford to pay more than 15% of their revenues for copyright fees and still earn enough profits to attract sufficient capital to sustain their growth. The calculations made in said study also suggest that cable owners would prosper, that their profits would be sufficiently above the level required by investors and that they should not find copyright fees in the aforesaid amount an impediment to their future growth.

This of course does not mean that 15% is actually what cable systems should pay as just and reasonable license fees for the use of copyrighted programs. It shows, however, that the assertion voiced by cable interests that the fee schedule in § 111 represents the maximum which they could afford to pay, is unwarranted or, at least, subject to substantial disagreement among experts in the field.

I respectfully submit to you that the percentages set forth in the schedule of § 111 having been set without thorough fact finding and economic evaluation, are *a priori* figures without any rational relationship to the value of the programs to any of the more than 3,000 CATV systems, which vary greatly in the number of their subscribers, the number of channels, the programs carried by them, the circumstances of their operation, and many other factors which should be taken into consideration. They are bound to be unfair either to a substantial part of the CATV industry, or to the program suppliers, or, which is more likely, to both. *We believe that the basic principle should be that CATV should pay, and the program suppliers should receive, "just and reasonable" royalties, and that the statute provide for an appropriate procedure for the setting of such fees.*

The determination of what fees are reasonable and should be paid by cable systems in fairness to themselves and to copyright owners depends on many factors obviously not taken into consideration when the fee schedule was fisrt inserted into the Committee Print of 1969. Such factors may include, among others, the location of the cable system, the number and origin of the signals it carriers, the value of the programs carried by the system, the size of the system, penetration of its franchised areas, saturation of the television market in which it operates, age and stage of development of the system, investments necessary to construct the facility, amortization of its capital investment, allocation of the investment in its plant to retransmission of broadcasts as distinguished from other activities of the system and literally thousands of variables on which the advice of economic experts should be sought.

It is apparent that a Congressional committee or subcommittee should not be burdened with such complicated and time consuming tasks of economic fact-finding and rate making. The setting of fee schedules based on complex economic data is, of course, not unknown in our society and economic system. Indeed, the questions faced here are very close to the ratemaking process engaged in by federal and state agencies setting rates for common carriers in transportation and communications and for such utilities as electric power and gas. Such administrative ratemaking procedures have been delegated traditionally by the Congress and the states to public utility commissions and similar administrative bodies which determine rate schedules fair both to the public and to investors in order to improve service. Even if arbitration had not been specifically provided for in the Consensus Agreement, its adoption is called for as the most sensible and fair method of resolving the question of what license fees are fair and reasonable.

Accordingly, it is the position of the copyright owners that the copyright revision bill should contain a provision for arbitration of the copyright fees payable under the compulsory license.

The Copyright Revision Bill (S. 1361, §§ 801 et seq.) provides for the establishment in the Library of Congress of a special Royalty Tribunal charged "to make determinations concerning the adjustment of the copyright royalty rates specified by Sections 111 . . ." and other sections. *It would appear appropriate that this Tribunal be charged from the outset with the setting of royalties under the compulsory license.*

The Copyright Royalty Tribunal would be an objective body and not beholden to either the cable industry or the copyright owners. It would be able to deal equitably and without favoring either side, on the fixing of fees. Indeed, it is possible that the Tribunal may, after its deliberations, determine that the cable operators ought to pay lower fees than what the copyright owners so strongly feel is reasonable. But that is the principal reason for arbitration—it is eminently fair, neither side has an advantage. The Tribunal will hand down its decision after full, complete and possibly mountainous piles of evidence will have been submitted by the parties and experts. In that event neither side can claim that it was short-changed. The fairness of the Tribunal is its most valuable asset.

The question has sometimes been asked of the copyright owners whether the periodic adjustment of the compulsory license fees provided for in the bill (§§ 801, 802) would not satisfy their concern regarding their inadequacy. At most, it is argued, the fees, if inadequate, would be adjusted at the end of a three-year period. Unfortunately, the practicalities of the situation do not provide sufficient reassurance on this point.

First of all, the initial setting in the bill of a royalty rate amounting to only a fraction of what would be a just and reasonable royalty, would make it extremely difficult for the Royalty Tribunal to multiply that fraction at the time of adjustment in order to reach a rate which the Tribunal might determine to be just and reasonable.

Secondly, regardless of the merits of such increase, it will undoubtedly be strongly resisted by interested parties because, it will be claimed, the cable industry will have adjusted itself economically to this low rate. Such economic misjudgment may well occur in spite of all warnings expressed by the Congress regarding the temporary nature of the original fees.

In any event and even if it were possible to achieve a fair adjustment of the rates after three years, there appears to be no good reason why the copyright owners should be deprived of just and reasonable royalties for an additional three-year period on top of the more than a decade of the free ride which the cable industry has enjoyed in the past.

III. ESSENTIAL CHANGES IN BILL

When S. 1361 was introduced by Chairman McClellan in the Congress (Congressional Record, March 26, 1973), he indicated that its cable television provisions would have to be revised in the light of events since December, 1969 when the Committee Print of the predecessor bill was reported out of the Senate Subcommittee on Patent Trademarks and Copyrights to the full Senate Committee on the Judiciary. On behalf of the copyright owners for whom I speak here I respectfully submit several suggestions for changes which they consider essential in order to permit and facilitate the continued production of high quality motion pictures and television programs.[7] These changes are in addition to those required by the insertion of an arbitration clause:

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[7] We have previously submitted to the Subcommittee a proposed text for §§ 111 and 501 which incorporates most of the changes proposed herein. That text, however, did not contain the change proposed for § 801 of the bill discussed below under subheading 3. Furthermore, a clarifying change has been made in the definition of "cable system" (§ 111(f)(1)(C) deviating slightly from our previously submitted text. I annex hereto as Appendix V a copy of our revised text for §§ 111, 501 and 801 containing the proposed changes which the copyright owners consider to be essential.

1. Grant of Compulsory License to Cable Systems with Appropriate Limitations on its Scope

Consistent with the Consensus Agreement the Bill should grant to cable systems a compulsory license to retransmit all signals lawfully being carried by them prior to March 31, 1972 ("grandfathered" signals) and all local signals as defined by the FCC as well as such other additional or distant signals as would be consistent with the rules adopted by the FCC in February, 1972. With respect to signals subject to compulsory licensing, violation of exclusivity provisions established by the FCC should be a copyright infringement for which both the copyright owner and the broadcaster holding an exclusive license shall have a remedy under copyright law through court actions for injunctions and monetary relief.

The Consensus Agreement provides that the compulsory license shall be limited to "those distant signals defined and authorized under the FCC's initial package" (in addition to local and "grandfathered" signals). In general terms, the FCC's initial rules contemplate importation of usually two distant signals into the 35-mile zones of larger markets (subject to certain exclusivity requirements), of enough distant signals to provide adequate program service within the 35-mile zones of smaller markets, and virtually unlimited distant signal carriage beyond the 35-mile zones of all markets. By incorporating by reference the pertinent provisions of the FCC's rules, the bill should adopt corresponding limitations on the scope of the compulsory license otherwise being given to cable systems. Thus, the retransmission by a cable system of distant signals beyond the compulsory license should be subject to full copyright protection. Further, as provided for in the Consensus Agreement the FCC would not ". . . be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings."

These provisions dealing with limitations on and enforcement of the compulsory license which are called for by the Consensus, were vital to reaching any consensus and are essential for insertion into §111 rather than to be left to regulation by the FCC. Such a compulsory license constitutes preferential treatment of CATV under copyright law at the expense of the program suppliers and broadcasters. Indeed, under the statutory compulsory license cable systems will not have to bargain with the copyright owners for the right to use their programs or for the amount of fees which they would have to pay for such use. In the light of these privileges granted to the cable industry, it would be completely unfair to allow a four member majority of the FCC to expand the scope of that compulsory license by simple administrative regulation as would be the case if the compulsory license were open-ended.

The limitation on the scope of the compulsory license is *not* a regulatory measure, nor is it a measure that unwisely ties the hands of the FCC. The FCC would retain full power to change its rules as it sees fit consistent with the public interest standards of the Communications Act. But the FCC would not be given, just as the FCC does not now have and should not have, the power to change the copyright law and thereby the power to take private property from one party and give it to another party simply through administrative fiat.

2. Basis for computation of fees

The present text of the bill imposes the percentage royalty on the gross amounts received from subscribers "for the basic service of providing secondary transmissions of primary broadcast transmitters." § 111(d)(2)(A).

Spokesmen for the CATV industry, however, have publicly voiced their hope that income and profit from sources other than secondary transmissions will permit them in the future to reduce the fees they charge to their subscribers and may even enable them to eliminate subscribers' fees entirely.

Thus, at the argument before the Supreme Court of *U.S. v. Midwest Video Corp.* (decided in 406 U.S. 649; 1972) the following colloquy took place between the Chief Justice and the Deputy Solicitor General, Mr. Lawrence G. Wallace as reported in 40 L.W. 3509.

The Chief Justice: "Is there advertising on cable TV?"

Mr. Wallace replied that it is authorized in cablecasting and furthermore, if the programs are picked up from the networks they are run as they are without deletions of advertisements.

The Chief Justice: "Does that mean that subscribers [of CATV] will be paying to have advertising?"

"Yes," Mr. Wallace replied, "but to the extent that there is advertising, *it will reduce the subscription rates.*" (italic supplied)

It is apparent that if said subscribers' fees should be reduced due to circumstances wholly unrelated to the use of programs and due solely to cable systems developing other sources of revenue, the copyright owner should not be deprived of his fair compensation. This is so especially since his property continues to be used by the CATV system which still retransmits its programs for promotional purposes in order to acquire and retain the subscribers to whom it sells other profitable services. *Consequently, the statute should provide that in readjusting the fees, the Tribunal shall have broad powers to set and to adjust the fees both with respect to the manner and method in which it is to be computed and the base on which the fees are to be assessed.*[8]

The granting of such broad powers to the Tribunal are necessary to prevent a manipulative restructuring of subscribers' fees in order to attract customers to operations of the cable system other than "the basic service of providing secondary transmission of primary broadcast transmitters."

In the absence of a specific grant of such powers, the Tribunal might not be in a position to promulgate fee changes freely and flexibly as economic changes and total fairness might require. Instead, it might be bound by the rigid limitations contained in the statute. It might not be able to take into consideration the requirements of a fast moving technological age. If the hands of the Tribunal were limited to a particular manner and method of setting the fees or if it had to utilize a particular base on which fees were to be assessed, the result may well be that the fees would be grossly or even shockingly inadequate. In such case, the parties *would be compelled to seek legislative relief and the history of copyright law revision abundantly demonstrates* how difficult it is to achieve statutory enactment in this field.

3. Guidelines for adjustment of fees

Another matter which causes great concern to the copyright owners, especially if the Congress should adopt a fixed fee schedule contrary to the joint recommendations of the parties contained in the Consensus Agreement and contrary to the arguments which I am presenting here today, is the wording of § 801(b) of S. 1361 which now provides that the Tribunal "shall make determinations concerning the adjustment of the copyright royalty rates specified by Section 111 . . . so as to assure that such rates *continue to be reasonable* . . ." (italic supplied). I urge that this language be changed to provide that the Tribunal "shall make determinations concerning the adjustment of the copyright royalty rates specified by § 111 . . . so as to assure that such rates *are just and reasonable*." Only thus will the Tribunal at the periodic review of the rates be able to proceed to an open and fair determination without any implication such as that contained in Section 801 as presently worded, that the royalty rates initially set in the statute were deemed "reasonable" when they were initially adopted.

4. Definition of Cable Systems

The degnition of cable systems as now contained in § 111(f)(1)(C) is ambiguous and may be misinterpreted to fragment the revenue of a system for the purpose of computing royalties payable under a progressive rate such as that used in the fee schedule of § 111 or such as may be adopted by arbitration. Thus the computation of royalties under the fee schedule of § 111 of S. 1361 made in Appendix I attached hereto and referred to *supra* on p. 296 is based upon the "conventional" definition of a cable system employed, for example, by the TV Fact Book. On the other hand, the FCC embodied a definition of cable systems into its cable rules § 76.5(a)) which contained a note as follows:

"NOTE: In general, each separate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by cable television system, constitutes a separate cable television system, even if there is a single headend and identical ownership of facilities extending into several communities. See, e.g., Telerama, Inc. 3 FCC 2d 585 (1966); Mission Cable TV, Inc., 4 FCC 2d 236 (1966)."

If the royalty computation of the Table, Appendix IV were to be based on the FCC's definition of cable systems, the revenues of individual cable systems would be fragmented to such an extent that they would pay an even lower rate of copyright fees until § 111's sliding scale. The result would be that the average effective fee paid by cable systems would be reduced from 1.93% to perhaps as low as 1%.

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[8] § 111 subsection (d)(2) as proposed by CCO (Appendix V attached hereto), provides that the cable system in its periodic reports must indicate "the gross amounts irrespective of source received by it" and provides for determination of "just and reasonable compulsory license fees" without limiting specifically the revenues which must serve as the base for computing the royalties.

Accordingly, the copyright owners urge that the following sentence be added to the definition of a "cable system" in § 111(f)(1)(C) of S. 1361:

"For purposes of determining the royalty fee under Subsection (d)(2)(B), two or more cable systems in contiguous communities under common ownership or control or operating from the one headend shall be considered as one system."

5. Exemption for small systems

Another point which I would like to bring to the attention of the Subcommittee is the exemption from copyright payments of presently existing independently owned cable systems having fewer than 3,500 subscribers as provided for in the Consensus Agreement. In this connection I share the opinion previously expressed by the Subcommittee that it is not desirable to exempt a commercial enterprise from the payment of copyright fees exclusively on the basis of size. Indeed, the copyright owners have given voice to this view in a letter to Mr. Thomas C. Brennan, Chief Counsel to the Subcommittee, dated February 28, 1969, in which they said that since even small systems pay substantial fees to municipalities for franchises and pay their suppliers of equipment and their utility bills without any exemptions or discounts, they should not be exempted from the payment of royalties for the program they use.

Thereafter, however, in an effort to reach agreement with the cable industry, we were persuaded that we should not oppose a reasonable exemption for small and independently owned systems.

While we recommended that such an exemption be granted to independently owned systems having less than 1,500 subscribers, the Consensus Agreement ultimately provided for a much larger exemption and covered systems up to 3,500 subscribers. Our support for this provision, therefore, is intimately connected with the Consensus Agreement and our desire to reach agreement on a carefully balanced "package." If that package is now disturbed, and one part of the Consensus Agreement essential to copyright owners repudiated by the cable industry—namely arbitration of the fee question—we would have no reason to continue to support the provision exempting systems with fewer than 3,500 subscribers which are "independently owned" and "now in existence." Accordingly if the Committee determines to set fees in the bill we believe it should not insert therein an exemption for smaller systems since it has no rational basis or justification in the public interest.

6. Special music fund

Section 111(d)(3)(C) of S. 1361 provides that 15% of the royalties collected shall be maintained in a special fund and distributed to the copyright owners or their designated agents, of musical works. It is felt that the allocation of the funds distributable should not be predetermined by the statute. The amounts payable by cable systems should be set by the Copyright Royalty Tribunal, and its allocation to the various groups of copyright owners including owners of musical works, should be left to the Tribunal on the basis of the economic evidence before it.

7. The Overly-Broad Governmental and Nonprofit Organization Exemption

Section 111 would exempt completely from any copyright law provisions secondary transmissions when made at cost by either governmental bodies or nonprofit organizations. This exemption in its present form appeared in H.R. 2512, 90th Cong., 1st Sess. As explained in the report on that bill, H. Rept. 83, 70th Cong., 1st Sess. at 53–54, this provision was concerned with the operations of "nonprofit 'translators' or 'boosters' which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception. . . ." These translators and boosters have always been subject to FCC regulation and require retransmission consent of the originating station under § 325(a) of the Federal Communications Act.

However, the language of the exemption as formulated in § 111 would be equally applicable to cable systems which are operated by governmental bodies or nonprofit organizations. In order to limit the exemption to nonprofit translators and boosters and similar secondary transmitters, we propose to insert into the text for § 111(a)(4) the words ". . . is not made by a cable system . . ."

There are a large number of nonprofit organizations in the United States. Many of them operate big enterprises. Moreover, there are already in existence at least 15 municipally-owned CATV systems and there is an increasing drive across the country for municipal ownership of cable systems. (See David Foster: "Municipal Ownership Makes Precious Little Sense" in CATV Newsweekly, July

18, 1973, p. 41). The copyright owners are concerned that increasing governmental or non-profit ownership of cable systems may deprive them of license fees for the use of their product.

A free ride for these entities cannot be squared with the achievement of the public purpose which underlies the copyright system. That purpose is to promote the useful arts by granting compensation adequate to foster creativity. A legal requirement that copyrighted film programs be available to nonprofit and governmental users for free is no less repugnant to the purpose of the copyright system because the user does not intend to make a profit.

No matter how well governmentally sponsored and nonprofit enterprises function, no one would suggest that the law require that their suppliers of equipment, products and services furnish them free of charge. Likewise no one would suggest that the law require artists to donate their paintings to publicly owned art museums or authors to donate writings to publicly owned libraries. Nor should the law require that the suppliers of the film products used by CATV supply them to CATV free of charge merly because the CATV is operating on a nonprofit basis. None of these bodies obtain free of charge the products and services upon which their operation depends. CATV should be no different.

IV. THE NEED FOR ADEQUATE COPYRIGHT FEES

1. *The adverse impact of CATV's importation of programs from distant stations on the program producers' income from television licenses*

Frequency allocations and determinations by the FCC of a station's power, and of the height and location of its transmitting antenna, together with electrophysical limitations on television reception imposed by the horizon, lead to a limitation of the area which the station's signals can reach for effective reception and to the creation of definite geographical areas and commercial "markets" serviced by local stations.

Copyright owners grant licenses to a television station for the telecasting of programs in that station's market. These licenses usually are specifically limited to the licensee station's present power and antenna height in order to prevent programs from being received in other markets.

A station's revenue and hence one of the factors which will determine the price which it is able to pay to the copyright owner for a license to broadcast a copyrighted work, depends on the size of the audience ***within the station's market*** but not on any audience outside of that station's market. Each time a program is exhibited in a market, the audience potential for the next showing of the program in that market is diminished.

When a cable system imports a program from a distant station, it scoops up part of the potential audience for that program in the market where the cable system operates with the result that the local station will pay only a reduced license fee, if it is willing to take a license at all, for a program which has already been shown in its market. CATV importations of these programs into other markets, in effect, deprives the copyright owners of their right to grant exclusive licenses in such other markets and thereby diminishes their ability to collect license fees in those markets. The FCC's non-duplication rules prevent such invasion of the station's markets only to a very limited extent and are applicable neither outside of the top 100 television markets nor to systems located more than 35 miles distant from reference points within any market.

2. *The claim of "double payment" is economically contrary to commonsense*

CATV spokesmen have claimed at times that copyright owners seek "double payment" for the same performance, i.e., first from the broadcasters and then from the cable system, and that in any event they should seek to make up their losses by charging additional fees to their licensee television stations whose programs the CATV systems retransmit. Since most of these stations are also the victims of CATV's competition and diversion of income in their own markets, such claims adds insult to injury. Moreover, the originating station will be unwilling to increase its fees because most advertisers will not pay additional rates for having their commercials carried to distant markets.

The net economic result of permitting the importation of programs from distant stations has been well described by Dr. Leland Johnson of the Rand Corporation in his study *Cable Television and the Question of Protecting Local Broadcasting*, 1970, p. 21 (prepared under a grant from the Ford Foundation):

"Because local audience is generally more valuable [to advertisers] than is the more distant audience, the financial costs of audience lost to the local station are likely to outweigh the gains to the distant station—implying a net reduction in financial resources available for programming. Under these circumstances . . . the benefit of cable growth might well lie largely in providing the public with more channels of worse stuff."

See also Mayer, *About Television*, New York, 1972, pp. 375, 376.

These facts of economic life in the program distribution industry have been recognized by the Court of Appeals in the *CBS v. Teleprompter* case, where the Court said in its footnote 2:

"Teleprompter has argued that the copyright holder can demand a greater fee from the broadcast station in the larger market in light of the greater audience that will now view the programs as a result of CATV. However, appellants have responded, and we must agree, that the amount that a broadcast station is willing to pay for the privilege of exhibiting a copyrighted program is economically tied more to the fees that advertisers are willing to pay to sponsor the program than to some projected audience size. No evidence was presented in the court below to show that regional or local advertisers would be willing to pay greater fees because the sponsored program will be exhibited in some distant market, or that national advertisers would pay more for the relatively minor increase in audience size that CATV carriage would yield for a network program. Indeed, economics and common sense would impel one to an opposite conclusion.

3. The Addition of a New Source of Income to Program Producers is in the Public Interest

Multiple uses of copyrighted works have traditionally led to the payment of separate royalties for each income producing use. Thus, as Dr. Leland Johnson explains in The Future of Cable Television (1970), another indepth economic study prepared by the aforecited distinguished economist for the Rand Corporation under a Ford Foundation grant (p. 27):

". . . the fact that a movie is produced primarily for the theatre market and supported by paid admissions does not suggest that television stations supported by advertising revenues should have free access to those movies. Nor does the production of programming primarily for the advertiser supported broadcast market suggest that cable systems supported by subscribers should have free access to that programming."

The history of the motion picture industry illustrates this point well. The sources of the industry's income have varied over the years. In pre-television days, motion picture income came primarily from exhibition in theatres. When television became a commercial fact, the feature films produced by the motion picture companies and already shown in threatres were licensed under copyright law to television stations and networks for broadcasting into the nation's homes and additional fees were paid for the separate broadcasting use. Fees for television network use did not include the right to use the films for non-network broadcasting. The subsequent showing of films in local stations (called "syndication" in the trade) provided an additional source of income for the program producers.

The same pattern of separate payments for different uses was applied when films made for television (as distinct from theatrical exhibition) began to come into widespread use. Thus original films made for television were licensed to television networks and then to local stations. These licenses did not permit use of the TV films by CATV, a use reserved to the licensor as a future source of income.

These patterns of different rentals for different uses are the patterns not only of the past years in which the motion picture industry grew, but still prevail today. The various sources of income from different uses of the same film provide money to pay the creative people who make the films.

The production and distribution of both feature films and television program series are characterized by a high degree of financial risk with large capital expenditure. Even where a motion picture is produced for initial exhibition in theatres, the great majority of these films would not break even, let alone make a profit, without revenue from television showings. Indeed, most feature films would not be produced at all were it not for the anticipated revenue from television.

Even more risky are the development, production and distribution of programs specifically designed for television. Producers of television series must initiate, with a substantial investment, a broad range of program development projects to insure a continuous flow of product. Fewer than one in five "development projects" (all of which require some cash risk) progress to the point of being a finished "pilot" film. The pilot itself is merely a sample program requiring a significant speculative outlay by the producer, the return of which is by no means guaranteed. Approximately two-thirds of the pilot programs are not successful, and of those which are successful, 90 percent of the producers do not recoup their expenses in the first run.

In order to permit producers to amortize their investment and to at least break even, it would seem natural that CATV contribute a fair share out of the cable systems' income from their use of copyrighted films. The addition of license fees from cable systems as a new source of income will be an incentive to increase and improve the production of programs.

According to Dr. Johnson, as set forth in the aforecited study *The Future of Cable Television*, CATV has an important public task to perform and there are good policy reasons why CATV should pay copyright fees. He says (p. 26):

"Even if advertiser erosion were not an issue, payment would constitute an additional revenue source to program producers that would likely stimulate production of additional programming in a *socially desirable fashion*." (Emphasis supplied)

As Dr. Johnson further explains, the contribution by CATV to the payment of copyright fees will not only constitute additional revenue for program producers and lighten the burden of broadcasters, but it will also improve diversity of programming which cable systems will be able to retransmit to their subscribers:

"Payment for both commercial and non-commercial signals may have beneficial effects on diversity in programming by reducing the programming costs to stations whose signals are carried on cable.

* * * * * * *

. . . the nature of what cable operators obtain will likely *not* be independent of what they pay. One can reasonably expect that their payments, in addition to advertiser revenues within the broadcasting system, would bring forth programming that otherwise would not have been produced" (*Id.* at pp. 39–40).

And in his other aforementioned study for the Rand Corporation entitled *Cable Television and the Question of Protecting Local Broadcasting* (1970, at pp. 20–21), Dr. Johnson explains the desirability of cable systems paying substantial fees to the copyright owners:

"If cable operators pay substantially for programming, they will, in effect be sharing the cost of programming with broadcasters, to the benefit of both.

* * * * * * *

For the reasons discussed above, the higher the fees set, the greater the extent to which cable operators will share programming costs with broadcasters, and the less severe the problem of maintaining adequate over-the-air services in the face of cable growth."

4. The Growth of the Cable Industry will increase the losses of the copyright owners unless substantial royalties are paid by that industry

The huges revenues of CATV, produced by the diversion of audiences from TV to CATV, will reduce the income presently collected from advertisers by the many hundreds of stations to whom film producers now license their copyrighted motion pictures.

When television appeared on the entertainment scene in the early nineteen hundred and fifties and diverted revenues from theatres to television stations, full copyright coverage applicable to the telecasting of motion pictures replaced at least a part of the lost theatrical revenues. The same has unfortunately not been true so far for CATV because of the failure of cable systems to contribute to the cost of program production. If the fee schedule of § 111 of S. 1361 should be adopted, the inadequate amount of such fees (see supra, Part III) would do little to remedy the situation.

As the number of viewers of television programs by means of CATV grows, the reward to the creative artists must shrink as broadcasters become fewer, and their audiences smaller. The end result must be that less and less talent will be attracted to the creation of television programs, that the standard of quality of such pograms will inevitably suffer, and that the number of programs in which it would appear fruitful to make an investment will decline, unless CATV is required to pay substantial copyright fees.

While the magnitude of the decline of the program production industry's income resulting from the spread of CATV is hard to express in terms of dollars and cents without the aid of economic fact-finding and expert evidence as outlined above, such decline will certainly be substantial. If uncompensated, this decline would threaten the continued viability of the industry and with it, the livelihood of the people who comprise it.

CONCLUSION

Throughout the long lasting debate on protection for copyrighted television programs against their uncompensated retransmission by cable systems, the copyright owners have encountered the myopic proposition that modern technology has made traditional principles of copyright protection too burdensome to "progress" and, hence, expendable. In my view, however, the Congress would commit a grave error if on such specious premise it were to erode the fundamentals of copyright protection which have stood since the beginning of the Republic.

To build cable systems, to multiply the number of distant signals carried by them and to increase the distances by the miracles of modern technology, does not result in bringing to the public more high quality programs. Television signals are nothing but electro-magnetic impulses. They may carry a message but contrary to McLuhan, they are not *the* message. *The public's demand is not for signals or channels but for programs.* To ignore this distinction is to fail totally to meet the real challenge of communications technology or to realize the potential of cable television.

Without the production of television programs, both broadcasting stations and cable systems would be unable to operate and the television receivers of the American public would stand dark and silent. To jeopardize or to minimize copyright protection for the creators of these programs is, inevitably, to collapse the structure upon which the television and cable industries stand. Copyright protection is a pillar of progress, not as some have come to represent it, a penalty on progress. If the price of the new technology of cable television is the discouragement or stagnation of creative endeavors, the American people will face the bleak future of living with a very sterile technology.

FULL TEXT—AGREEMENT AMONG PRINCIPAL INDUSTRY GROUPS

Compromise Sponsored by Office of Telecommunications Policy With Representatives of Broadcasters, Copyright Owners and Cable Systems

APPENDIX D

CONSENSUS AGREEMENT

Local Signals:

Local signals defined as proposed by the FCC, except that the significant viewing standards to be applied to "out-of-market" independent stations in overlapping market situations would be a viewing hour share of at least 2% and a net weekly circulation of at least 5%.

Distant Signals:

No change from what the FCC has proposed.

Exclusivity for Non-Network Programming (against distanct signals only):

A series shall be treated as a unit for all exclusivity purposes.

The burden will be upon the copyright owner or upon the broadcaster to notify cable systems of the right to protection in these circumstances.

A. Markets 1–50

A 12-month pre-sale period running from the date when a program in syndication is first sold any place in the U.S., plus run-of-contract exclusivity where exclusivity is written into the contract between the station and the program supplier (existing contracts will be presumed to be exclusive).

B. Markets 51–100.

For syndicated programming which has had no previous non-network broadcast showing in the market, the following contractual exclusivity will be allowed:

(1) For off-network series commencing with first showing until first run completed, but no longer than one year.

(2) For first-run syndicated series, commencing with first showing and for two years thereafter.

(3) For feature films and first-run, non-series sydicated programs, commencing with availability date and for two years thereafter.

(4) For other programming, commencing with purchase and until day after first run, but no longer than one year.

Provided, however, that no exclusivity protection would be afforded against a program imported by a cable system during prime time unless the local station is running or will run that program during prime time.

Existing contracts will be presumed to be exclusive. No preclearance in these markets.

C. Smaller Markets.

No change in the FCC proposals.

Exclusivity for Network Programming:

The same-day exclusivity now provided for network programming would be reduced to stimultaneous exclusivity (with special relief for time-zone problems) to be provided in all markets.

Leapfrogging:

A. For each of the first two signals imported, no restriction on point of origin, except that if it is taken from the top 25 markets it must be from one of the two closest such markets. Whenever a CATV system must black out programming from a distant top-25 market station whose signals it normally carries, it may substitute any distant signals without restriction.

B. For the third signal, the UHF priority, as set forth in the FCC's letter of August 5, 1971, p. 16

Copyright Legislation:

A. All parties would agree to support separate CATV copyright legislation as described below, and to seek its early passage.

B. Liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3500 subscribers. As against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the Commission may allow.

C. Compulsory licenses would be granted for all local signals as defined by the FCC, and additionally for those distant signals defined and authorized under the FCC's initial package and those signals grandfathered when the initial package goes into effect. The FCC would retain the power to authorize additional distant signals for CATV carriage; there would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings.

D Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.

E. Broadcasters, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

Radio Carriage:

When a CATV system carries a signal from an AM or FM radio station licensed to a community beyond a 35-mile radius of the system, it must, on request, carry the signals of all local AM or FM stations, respectively.

Grandfathering:

The new requirements as to signals which may be carried are applicable only to new systems. Existing CATV systems are "grandfathered." They can thus freely expand currently offered service throughout their presently franchised areas with one exception: In the top 100 markets, if the system expands beyond discrete areas specified in FCC order (e.g., the San Diego situation), operations in the new portions must comply with the new requirements.

Grandfathering exempts from future obligation to respect copyright exclusivity agreements, but does not exempt from future liability for copyright payments.

APPENDIX E

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

January 26, 1972

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights,
U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: This letter is directed to an important policy aspect of our present deliberations on a new regulatory program to facilitate the evolution of cable television. That is the matter of copyright legislation, to bring cable into the competitive television programming market in a fair and orderly way—a matter with which you as Chairman of the Subcommittee on Patents, Trademarks and Copyrights have been so deeply concerned in this and the last Congress.

You will recall that we informed the Congress, in a letter of March 11, 1970 to Chairman Magnuson, of our view that a revised copyright law should establish the pertinent broad framework and leave detailed regulation of cable television signal carriage to this administrative forum. In line with that guiding principle and a statement in our August 5, 1971 Letter of Intent that we would consider altering existing rules to afford effective non-network program protection, we are now shaping a detailed program dealing with such matters as distant signal carriage, the definition of local signals, leapfrogging, and exclusivity (both network and non-network). That program is now approaching final action.

As of course you know, representatives of the three principal industries involved—cable, broadcasters, and copyright owners—have reached a consensus agreement that deals with most of the matters mentioned above. On the basis of experience and a massive record accumulated over the past several years, we regard the provisions of the agreement to be reasonable, although we doubtless would not, in its absence, opt in its precise terms for the changes it contemplates in our August 5 proposals. But the nature of consensus is that it must hold together in its entirety or not at all—and, in my own view, this agreement on balance strongly serves the public interest because of the promise it holds for resolving the basic issue at controversy.

This brings me directly to a key policy consideration where your counsel would be most valuable. That is the effect of the consensus agreement, if incorporated in our rules, on the passage of cable copyright legislation.

The Commission has long believed that the key to cable's future is the resolution of its status vis-a-vis the television programming distribution market. It has held to this view from the time of the First Report (1965) to the present. We remain convinced that cable will not be able to bring its full benefits to the American people unless and until this fundamental issue is fairly laid to rest. An industry with cable's potential simply cannot be built on so critical an area of uncertainty.

It has also been the Commission's view, particularly in light of legislative history, that the enactment of cable copyright legislation requires the consensus of the interested parties. I note that you have often stressed this very point and called for good faith bargaining to achieve such consensus.

Thus, a primary factor in our judgment as to the course of action that would best serve the public interest is the probability that Commission implementation of the consensus agreement will, in fact, facilitate the passage of cable copyright legislation. The parties themselves pledge to work for this result.

Your advice on this issue, Mr. Chairman, would be invaluable to us as we near the end of our deliberations.

With warm personal regards.

Sincerely,

DEAN BURCH, *Chairman.*

U.S. SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

(Pursuant to Sec. 13, S. Res. 32, 92d Congress)

Washington, D.C. 20510

January 31, 1972

Hon. DEAN BURCH,
Chairman, Federal Communications Commission, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of January 26, 1972, requesting my advice on the effect of the consensus agreement reached by the principal parties involved in the cable television controversy on the passage of legislation for general revision of the copyright law.

I concur in the judgment set forth in your letter that implementation of the agreement will markedly facilitate passage of such legislation. As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties.

The Chief Counsel of the Subcommittee on Patents, Trademarks and Copyrights in a letter of December 15, 1971 has notified all the parties that it is the intention of the Subcommittee to immediately resume active consideration of the copyright legislation upon the implementation of the Commission's new cable rules.

I hope that the foregoing is helpful to the Commission in its disposition of this important matter.

With kindest regards, I am
Sincerely,

JOHN L. MCCLELLAN, *Chairman.*

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Robinson, Ill., February 14, 1972.

Mr. DAVID HOROWITZ,
SCREEN GEMS
New York City, N.Y.

DEAR MR. HOROWITZ: As you know, the FCC issued its long-awaited CATV Report and Order on February 3. The rules adopted in that document are largely based on the compromise agreement of November 5, 1971, to which NCTA, NAB, AMST and the *ad hoc* copyright owners' committee were signatories.

NCTA has analyzed the new rules, and, although we would have preferred to have many of the provisions enacted in a different manner, we have decided not to cause further delay by our opposition.

The compromise obliged all of the agreeing parties to support implementation of its provisions. The FCC has now acted, and the new rules are scheduled to take effect on March 31. I trust that you will joint with us in opposing any reconsideration of the Report and Order, attempts to stay the effective date, or appeals from the rules. Support of the Commission at this time is called for by the compromise.

Best personal regards,
Sincerely,

JOHN GWIN.

PICTURE INDUSTRIES, INC.,
New York, N.Y., February 18, 1972.

Mr. JOHN GWIN,
Chairman of the Board, National Cable Television Association, Inc., Robinson, Ill.

DEAR MR. GWIN: Thank you for your letter of February 14, 1972.

We are in full accord with your statement that "the compromise obliged all of the agreeing parties to support implementation of its provisions." I trust that we are also in agreement that such implementation pertains not only to the rules issued by the FCC but also to copyright legislation and that these two aspects of implementing the Compromise are inextricably tied together.

In this connection, I would like to stress the need for immediate meetings between our respective lawyers to agree on the text of a revised Section 111 of the Copyright Bill which would reflect the provisions of the Compromise and which the parties would recommend jointly to the Congress. In my absence, Gerald Phillips telephoned you earlier this week to request that NCTA's lawyers be made available for this purpose at dates earlier than they have stated they could meet in view of their other NCTA commitments. I sincerely hope that you will be able to arrange for such a meeting within the next several days.

As to the fee schedule under the compulsory license, the members of your and our negotiating committees agreed at our last meeting that a fee schedule could not be worked out between the parties. It was recognized that this was inevitable as long as NCTA feels that any agreement must provide for a single fee to embrace all types of program material. Obviously, since our Committee represents producers and distributors of filmed and taped television programs, we could not negotiate for fees payable to the music performing societies, the networks or other possible claimants. This is a point which we had made at the outset of our negotiations, and it was for that reason that we suggested to your Committee at our meeting in December of last year that NCTA should enter into negotiations with these other groups.

In any event, it has been quite clear to both parties that any further efforts at negotiation of fees would not only be fruitless, but would delay prompt introduction and enactment of a copyright bill, which is essential to implementation of the consensus agreement.

At the last meeting of the two industry committees, the NCTA representatives stated that despite this inability to agree upon fees, the NCTA would nonetheless support inclusion in the statute of a fee schedule not agreed to by the parties. In a subsequent conversation, Alfred Stern confirmed to me that this was the official position of the NCTA, adopted at a board meeting of the Association. In our view, this violates the clause of the Compromise which states expressly that "[u]nless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees." In view of the past history of open and fair dealing between our groups, the indicated failure of the NCTA to support the cited provision of the Compromise has caused grave concern among the members of our Committee.

In the meanwhile, I have received conflicting reports on the official attitude taken by the NCTA regarding its support for the above provision of the Compromise. I believe, therefore, that it would be most helpful if you could advise me by letter of the NCTA's unequivocal position that it supports *all* of the provisions of the Compromise including that dealing with arbitration. Such assurance would be most helpful in bringing about a full and speedy implementation of the Compromise, a goal to which our industry is completely committed.

With best personal regards.

Sincerely yours.

DAVID H. HOROWITZ.

CABLE TELEVISION INDUSTRY 1971 FEE STRUCTURE OF S. 1361

Annual revenue range (thousands)	Marginal rate (percent)	Systems	Subscribers (millions)	Revenue (millions)	Fee (millions)	Effective rate (percent)
$0 to $160	1	2,075	1.70	$109	$1.09	1.00
$160 to $320	2	464	1.53	97	1.21	1.24
$380 to $480	3	147	.83	53	.88	1.66
$480 to $640	4	47	.39	25	.53	2.15
$640 plus	5	105	1.76	112	3.93	3.51
Total		2,839	6.20	396	7.63	1.93

PROPOSED TEXT OF CABLE TELEVISION SUBMITTED BY COMMITTEE OF COPYRIGHT OWNERS

SEC. 111. Limitation on exclusive rights: Scondary transmissions

(a) CERTAIN SECONDARY TRANSMISSION EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by a common, contract, or special carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided, That* the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmission; or

(4) the secondary transmission is not made by a cable system and is made by a governmental body, or other non-profit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS—

(1) Subject to the provisions of clause (2) of this subsection (c), secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) in the following cases:

(A) Where the signals comprising the primary transmission are exclusively aural and the secondary transmission is permissible under the rules and regulations of the Federal Communications Commission; or

(B) Where the community of the cable system is in whole or in part within the local service area of the primary transmitter; or

(C) Where the signals comprising the secondary transmission are contemplated by and consistent with section 76.5(a), (f), (g), (h), (i), and (o) through (u) and Subparts D and F of the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252 *et seq.*, on February 12, 1972.

(2) notwithstanding the provisions of clause (1) of this subsection (c), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the signals comprising the secondary transmission, whether or not authorized by the Federal Communications Commission, are inconsistent with, or in excess of those contemplated by, the rules and regulations of the

Federal Communications Commission referred to in subclause (C) of clause (1) of this subsecti[illegible] (c); or

(B) Where the community of the cable system is in whole or in part within the local service area of one or more television broadcasting stations licensed by the Federal Communications Commission and—

(i) the content of the particular transmission program consists primarily of an organized professional team sporting event occurring simultaneously with the initial fixation and primary transmission of the program; and

(ii) the secondary transmission is made for reception wholly or partly outside the local service area of the primary transmitter; and

(iii) the secondary transmission is made for reception wholly or partly within the local service area of one or more television broadcasting stations licensed by the Federal Communications Commission, none of which has received authorization to transmit said program within such area.

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it together with the name and location of the primary transmitter, or primary transmitters, and thereafter from time to time, such further information as he Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause (1).

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall during the months of January, April, and July and October, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation and furnish such further information as the Register of Copyrights may require to carry out the purposes of this clause (2)—

(A) A statement of account, covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system and the gross amounts irrespective of source received by the cable system.

(B) A total royalty fee for the period based upon a schedule or schedules to be determined as follows:

(i) Within sixty days after the enactment of this Act, the Register of Copyrights shall constitute a panel of the Copyright Royalty Tribunal in accordance with Section 803 for the purpose of fixing a schedule or schedules of just and reasonable compulsory license fees.

(ii) The schedule or schedules of compulsory license fees shall be determined by the Tribunal in a like manner as if the Tribunal were convened to make a determination concerning an adjustment of copyright royalty rates, *provided*, however, that Sections 806 and 807 shall not apply and that the determination of the Tribunal shall be effective at the end of the twelfth month after the enactment of this Act or on the date the Tribunal renders its decision, whichever occurs sooner.

(iii) The Tribunal, immediately upon making a determination, shall transmit its decision, together with the reasons therefor, to the Register of Copyrights who shall give notice of such decision by publication in the Federal Register within fifteen days from receipt thereof. Thereafter, the determination of the Tribunal may be subject to the judicial review in a like manner as provided in Section 809 but no other official or court of the United States shall have power or jurisdiction to otherwise review the Tribunal's determination.

(iv) Notwithstanding any of the provisions of the antitrust laws (as designated in § 1 of the Act of October 15, 1914, p. 323, 38 Stat. 730, Tit. 15 U.S.C. § 12; and any amendment of any such laws) owners of copyrights in different works and owners of cable systems may among themselves or jointly with each other agree on, or submit to the Copyright Tribunal for its consideration, one or more proposed schedules of compulsory license royalty fees, and proposed categories of secondary transmissions and cable systems for inclusion in any of the schedules to be established or adjusted by the Tribunal pursuant to this subsection and Section 802.

(C) The preceding subclause (B) of clause (2) of this subsection (d), shall not apply to cable systems that before March 31, 1972, were operating in accordance with the rules and regulations of the Federal Communications Commission, served less than 3,500 subscribers, and were not, directly or indirectly, by stock ownership or otherwise, under common ownership or control with any other cable systems serving in the aggregate more than 3,500 subscribers, *provided* that this exemption shall continue to apply as long as the cable system continues to serve not more than 3,500 subscribers and is not directly or indirectly, by stock ownership or otherwise, under common ownership or control with any other cable systems serving in the aggergate more than 3,500 subscribers, and *provided further*, that such cable system files annually at the Copyright Office in accordance with requirements that the Register of Copyrights shall prescribe by regulation, a statement setting forth the names and addresses of other cable systems directly or indirectly in control of controlled by or under common control with the cable system filing the statement, the number of subscribers served by each of such other cable systems; and the names and addresses of any person or persons who directly or indirectly own or control the cable system filing the statement and directly or indirectly own or control any other cable system or systems, and the names and addresses of the cable systems so owned or controlled. For the purposes of this subclause (C) of clause (2) of subsection (d), "subscriber" shall mean a household or business establishment, or, if a hotel, apartment house or similar establishment, it shall mean a lodging or dwelling unit within such establishment containing a television receiving set.

(3) The royalty fees deposited under clause (2) shall be subject to the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions made during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws (as designated in § 1 of the act of October 15, 1914, 38 Stat. 730, Tit. 15 U.S.C. § 12, and any amendments of any such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or many designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the statement of account or the distribution of royalty fees deposited under clause (2). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If he finds the existence of a controversy he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(C) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) *Relation to other laws and regulations.*—Nothing in this section shall be construed as limiting or preempting the authority of the Federal Communications Commission to regulate the operations of broadcast stations or cable systems pursuant to any other Act of Congress: *Provided that*, the Federal Communications Commission shall not limit the area, duration or other scope of the exclusivity a television broadcast station may acquire respecting secondary transmissions by cable systems that are not subject to the compulsory license provided for in subsection (c) of this Section 111 beyond any limits that may be applicable to the area, duration or other scope of the exclusivity a television broadcast station may acquire respecting other television broadcast stations.

(f) *Definitions.*—As used in this section, the following terms and their variant forms mean the following:

(1) A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

(2) A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission without change in program or other message content.

(3) A "cable system" is a facility that in whole or in part receives signals transmitted by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under Subsection (d)(2)(B), two or more cable systems in contiguous communities (including different political divisions or subdivisions) under common ownership or control or operating from one headend shall be considered as one system.

(4) The "local service area of a primary transmitter" as used in this section comprises the area in which a television broadcast station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252, *et seq.*, on February 12 1972, or such similar rules as the Federal Communications Commission may from time to time lawfully adopt in the future in light of changed circumstances.

(5) The terms "full network station," "partial network station," "independent commercial station," and "non-commercial educational station" as used in subpart D of the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252, *et seq.*, on February 12, 1972, shall be defined in accordance with the rules and regulations of the Commission of the same date with such additional elaboration as the Commission may from time to time provide consistent with the intent of this Act.

(g) This section shall be effective upon the enactment of this Act.

[Add the following to section 501]

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section 501 be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television broadcast station.

Amend Section 801(b) by deleting the words "continue to be reasonable" and by substituting the words "are just and reasonable."

THE PROFITABILITY OF CABLE TELEVISION SYSTEMS AND EFFECTS OF COPYRIGHT

(Robert W. Crandall, Associate Professor, M.I.T. and Lionel L. Fray, Senior Executive Consultant, T.B.S.)

FEE PAYMENTS

SUMMARY

Following the implementation of new FCC regulatory policy for cable television in early 1972, representatives of the cable television and program production industries have been attempting to determine a mutually acceptable schedule of fee payments by the cable industry for the commercial use of copyrighted programming. Agreement on a schedule would facilitate the passage of legislation and permit the cable television industry more rapidly to fulfill its potential for serving the public, an objective supported by the FCC, OTP, and probably a majority of the Congress and the public—as well as by the copyright owners.

Unfortunately, agreement has not been possible chiefly because the representatives of the cable television industry argue that many cable systems are not sufficiently profitable to cover their capital costs, and that copyright fee payments in any significant amounts would reduce cable system profits to a level so low that the industry would be unable to attract new capital to permit future growth. The major evidence advanced to support their views is an economic study undertaken for the industry by Mitchell.[1]

We have independently attempted to assess the profitability of cable television systems, and the likely effects of copyright fees upon their ability to attract sufficient amounts of capital to sustain future growth. The analysis incorporates not only much of Mitchell's evidence, but also additional data developed subsequent to the publication of his paper.

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[1] Bridger M. Mitchell in association with Robert H. Smiley, Cable Television Under the 1972 FCC Rules and the Impact of Alternative Copyright Fee Proposals, An Economic Analysis, Sept. 30, 1972.

Our results demonstrate that *large and intermediate size cable systems in the top 100 markets could expect to earn high rates of return even after payment of copyright fees.* These conclusions differ sharply with the Mitchell study which concluded that no system in the top 100 markets could realize a rate of return in excess of its cost of capital, even with no copyright fee payments.

An alternative interpretation of our results is to specify the extent to which prospective cable profits exceed a rate of return sufficient to attract new capital. If we posit this rate of return to be 15 percent, our results show that the excess return available for typical systems, expressed as a percentage of revenues, is as follows:

Percentage of revenues available after allowance for 15 percent return on total capital

	Percent
Top 50 markets	20
Market 51–100	17
Market 101 plus	13

Thus, these systems could afford to pay more than 13 percent of their revenues for copyright fees, and still earn sufficient profits to attract the capital required to sustain their growth. The above results reflect certain reasonable assumptions regarding the growth rate of revenues, system location, size, and so forth. As Section E of the report shows, somewhat higher and lower values may be obtained via other sets of assumptions, but the general conclusions remain the same—the systems are on the whole far from unprofitable.

Our conclusions are different from Mitchell's for two major reasons. First, we employ cable owners' predictions of future penetration which are substantially higher than those used by Mitchell. And second, our estimates of revenues per subscriber are higher, reflecting current reality and anticipations revealed by cable owners in their sales of current systems.

In short, our assumptions, which are based upon rather solid evidence from the industry itself, lead us to more cheering conclusions regarding the industry's future. Our calculations suggest that cable owners should prosper and that their profits should be sufficiently above the level required by investors that they should not find copyright fees an impediment to future growth. Moreover, these results are consistent with a very significant alternative source of data—the valuations of cable television systems sold in recent years, and the expected profitability they reveal.

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April 25, 1973

The Profitability of Cable Television Systems and Effects of Copyright Fee Payments

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A. INTRODUCTION AND SUMMARY CONCLUSIONS

During the past year, following the implementation of new regulatory policy via the Federal Communications Commission's Cable Television Rules,[1] representatives of the cable television industry and copyright owners have been attempting to negotiate a schedule of copyright fee payments. Agreement would facilitate passage of copyright legislation and "erase an uncertainty that now impairs cable's ability to attract the capital investment needed for substantial growth."[2] The passage of such legislation would further help meet the FCC's regulatory objective: "to get cable moving..."[3]

To assist in these negotiations, the National Cable Television Association (NCTA) commissioned a study by Bridger Mitchell[4] of the effects of the new regulatory policy and various proposals which have been made for a copyright fee schedule. The study concluded that "the outlook for early development of cable television service in the major cities is at best mixed"[5] because of poor prospective profitability and that "to require more than quite limited copyright payments will significantly retard or halt CATV expansion in urban markets."[6] The report includes results of calculations which suggest that only the very largest systems, located at the edge of the top 100 television markets, or outside these markets altogether, could possibly pay as much as 5 percent of their gross revenues for copyright fees. This report is in many respects an "update" of a previous work[7] which came to similarly gloomy conclusions in 1970 and with which we took issue.[8]

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[1] Federal Communications Commission--Cable Television Service; Cable Television Relay Service, Federal Register, Vol. 37, No. 30, Feb. 12, 1972.

[2] Ibid., p. 3260, paragraph 65.

[3] Ibid., p. 3259, paragraph 58.

[4] Bridger M. Mitchell in association with Robert H. Smiley, Cable Television Under the 1972 FCC Rules and the Impact of Alternative Copyright Fee Proposals, An Economic Analysis, Sept. 30, 1972.

[5] Ibid., p. 43.

[6] Ibid., p. 43.

The conclusions of Mitchell's study, if valid, would seriously affect the negotiations and the prospective legislation because they imply that cable television system operators would be unable to pay copyright fees in any significant amounts. Indeed, they suggest that "getting cable moving" is a hollow phrase because systems in the center of the top 100 markets, which represent the bulk of cable television's future potential for development, can develop rates of return of only 2.4 percent to 10.4 percent--rates which are below their estimated cost of capital--even in absence of any copyright payments.

Fortunately, cable owners are not faced with such bearish prospects. Mitchell's projections are faulty for two reasons.

1. They project revenues per subscriber of $64.60 per year ad infinitum despite many indications that revenues will increase over time; and
2. They assume a very low rate of penetration in the largest markets on the basis of one academic study, despite the expectations of major cable system operators, as reported by the NCTA, which projected subscription rates nearly twice as high.

While Mitchell allows for wage inflation in his cost formulation, he fails to allow revenues per subscriber to rise over the life of the franchise. He projects a yield of $64.60 per subscriber per year forever despite the potential which new services, pay channels, and subscriber fee increases promise in the very near future. We shall show below that cable owners are currently anticipating an effective rate of growth in revenues per subscriber of approximately 4 percent per annum.

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[7] William S. Comanor and Bridger M. Mitchell, The Economic Consequences of the Proposed FCC Regulations on the CATV Industry, Dec. 7, 1970.

[8] Lionel L. Fray and John D. Wells, Comments on the National Cable Television Association's Independent Economic Study, Feb. 8, 1971.

In addition, Mitchell uses the most pessimistic extant statistical study to project subscriber demand in the top 100 markets. This study predicts that only 22 to 45 percent of homes passed in these largest markets will eventually subscribe. The NCTA's own projections, obtained from a survey of its members, place mature penetration at 65 percent of homes passed,[9] a statistic which we accept as the best informed estimate of cable potential in these markets.

In the analysis described below, we have reestimated the prospective profitability of cable television, and we reach much more optimistic conclusions. While we utilize Mitchell's cost parameters throughout with only minor modifications, we are confident that these estimates are accurate only for systems of approximately 10,000 subscribers at maturity. For smaller systems, Mitchell's cost estimates are too high and for larger systems they are too low. Minor modifications have been made in the extent of underground construction mandated by local communities and in the temporal pattern of investment. Otherwise, our only adjustments in the basic assumptions employed by Mitchell involve projections of mature subscriber levels in the top 100 markets and the rate of growth of revenues per subscriber. When the cable industry's own projections of these magnitudes is substituted for Mitchell's unrealistically low estimates, profitability is increased substantially. The difference between our estimates, based upon a conservative 2 percent growth in revenues per subscriber, and Mitchell's are presented in Table A-1.

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[9] Don Andersson, The CATV Industry - Current Subscriber Penetration, Projected Subscriber Growth, Capitalization, by 5 Year Periods 1972-1992. With Special Emphasis on Existing and Potential Cable Systems Within 35-Mile Zones on the Top-100 Television Markets.

Table A-1

The Profitability of Cable Television Systems:
Revised Estimates for a Typical 10,000 Subscriber System

	Rate of Return on Investment Before Taxes Without Copyright Fees:	
Market	Revised Estimate	Mitchell's Estimate
Top 50 - Middle	23.4%	4.0 - 6.1%
Top 50 - Edge	21.2%	6.4 - 7.3%
51-100 - Middle	21.3%	2.4 - 6.1%
51-100 - Edge	19.8%	5.5 - 8.1%
101+ - Middle	21.5%	17.0%
101+ - Edge	18.6%	Not Given

Note: Revised estimate based upon assumption of 64.8% subscriber penetration in Top 50 markets, 65.3% subscriber penetration in all other markets, and 2 percent growth in revenues per subscriber.

Since it is widely believed that investors must realize a 15 percent rate of return on total investment before taxes, our estimates place the prospective returns considerably above the profits required to reward investors adequately for the risk they incur. The magnitude of these "excess returns" available for copyright fees or other purposes may be deduced from Table A-2 which measures the ratio of these excess returns to annual revenues.

Table A-2

The Percentage of Revenues Available For Copyright Fees or Other Purposes After Allowance for a 15 Percent Rate of Return

Market	Percentage of Revenues Represented by Excess Returns
Top 50 - Middle	25.1%
Top 50 - Edge	20.4%
51-100 - Middle	20.6%
51-100 - Edge	16.9%
101+ - Middle	21.3%
101+ - Edge	13.4%

That cable television is not courting bankruptcy is obvious from a perusal of these estimates for a typical 10,000 subscriber system. The empirical details and analytical techniques which compel such a conclusion are contained in the five principal sections of this paper which follow and in a comprehensive statistical appendix.

Section B details the important parameters involved in calculating the rate of return on cable-system investment. Section C reviews the NCTA report's crucial assumptions, suggesting more reasonable alternatives in several instances. Section D reviews the terms obtained by system owners in recent mergers, deriving from these price estimates imputed expected future growth of revenues and profits. Section E contains the results of our calculations, including an examination of the effects of alternative copyright fee schedules. Finally, Section F is a full statement of our conclusions. The Appendix of the report, a separate volume, contains the voluminous computer printouts which define the detailed calculations of the results obtained.

B. KEY VARIABLES IN CALCULATING CABLE SYSTEM PROFITABILITY

This section describes the calculations performed in determining cable system profitability and introduces the most important variables that affect these calculations.

1. Measurement of Profitability

Critical to Mitchell's study and our calculations is the internal rate of return--a fundamental measure of the profitability of capital investments. The internal rate of return on any investment project is that discount rate which equates total future discounted revenues to total discounted future costs. Since the discounted value of any revenue or expense item is directly proportional to its absolute magnitude and inversely proportional to its temporal distance from the present, both the timing and the magnitude of revenue or expenditure items play a critical role in the final calculations. This is not an idle point, as we shall see, for Mitchell has made some very important implicit assumptions about the timing of both revenues and costs.

The precise method for calculating the value of the rate of return is easily described. If we call p (t) the average revenue per subscriber at time t and S (t) the average number of subscribers at time t, the present value of all future revenues is:

$$PV_R = \sum_{t=1}^{\infty} \frac{p(t) \cdot S(t)}{(1+r)^{t-1}} \tag{B.1}$$

Defining operating costs in each period as OC (t) and capital outlays as K(t), we may express the present value of all future outlays as:

$$PV_C = \sum_{t=1}^{\infty} \frac{OC(t) + K(t)}{(1+r)^{t-1}} \tag{B.2}$$

Combining these two formulas gives us the equation to be solved for r once all revenue and cost data are entered:

$$\text{(B. 3)} \qquad \sum_{t=1}^{\infty} \frac{p(t) \cdot S(t) - OC(t) - K(t)}{(1+r)^{t-1}} = 0$$

2. Revenues

As the formula for calculating the internal rate of return implies, revenues per subscriber, p(t), must be computed for all future time periods. These revenues are obtained from subscribers' monthly fees, the charge for second or third connections within the subscribing home, installation fees, advertising revenues, and revenues from leasing channels to independent suppliers of entertainment fare. Data on monthly fees currently realized by cable systems are easily obtained, but the future pattern of these fees is not so easily ascertained since changes in the monthly fee must typically be approved by municipal licensing authorities. In addition, there are only indirect data on the extent of "secondary" fees from households electing to connect more than one receiver to the cable.

More speculative is the magnitude and rate of development of "ancillary revenues"--from such sources as advertising, pay-cable, and other services provided in addition to retransmissions. Most of these sources are only beginning to develop at present, but most participants in the industry expect these revenues to grow substantially in the near future.

Mitchell's approach to estimating the future pattern of revenues per subscriber is quite simple. He assumes that the monthly fee is \$5 and that 20 percent of all subscribers elect to connect a second set at \$1 per month. Advertising revenues are projected at \$2.20 per subscriber per year. All of these estimates are projected to grow at an annual rate of zero percent per annum. Other ancillary revenues are ignored.

The most important single variable in calculating the rate of return is the projected penetration of cable subscribers (i.e., the ratio of subscriber homes to total potential homes in the franchise area). Penetration, in turn, is the product of two phenomena: the attractiveness of the cable offering relative to off-the-air alternatives and the temporal rate at which households recognize this difference and actually subscribe. Thus, we must predict the ultimate "mature" value of cable penetration and the rate at which maturity is achieved.

There are a number of approaches to predicting the ultimate penetration of mature cable systems. The first is simply to view the recent experience of the industry and to extrapolate subscriber penetration for the next ten or fifteen years. This approach is weak because it is difficult to predict penetration in the top 100 markets since system growth in these areas in the recent past has been seriously impeded by FCC policy. Recent experience outside the top 100 markets cannot be utilized to predict consumer acceptance within these markets where signal quantity and quality is likely to be much better.

A second technique for predicting cable penetration is the use of published studies of demand relationships which have been estimated from existing data. These demand relationships can be fitted to the data for a variety of markets--including the number of imported signals allowed by the FCC, projections of price and income, and various other variables--to yield predictions of future mature subscriber penetration for each. This is precisely Mitchell's approach, for he uses a recent study by R. E. Park[10] of the Rand Corporation as his only basis for predicting cable penetration. We shall examine the appropriateness of Mitchell's choice in the next section by fitting Park's demand equation and an earlier relationship estimated by Comanor and Mitchell to data drawn from a random sample of cable systems.

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[10] R. E. Park, Prospects for Cable in the 100 Largest Television Markets, The Bell System of Economics and Management Science, Vol. 3, No. 1, Spring 1972.

A final possibility for predicting mature cable penetration is to utilize the projections provided by the system operators themselves. Fortunately, such projections have been provided on a confidential basis to the NCTA by large multiple system owners.[11] We shall consider this alternative in the next section after testing the existing statistical demand models against new data.

3. Operating Costs

Operating costs are defined as those annual, recurring, non-capital expenditures required to provide cable service to subscribers. Unfortunately, precise data on these costs are not normally available from the nation's operating systems. Most systems do not report financial statistics to the public since their securities are not publicly traded. Moreover, systems operating under the new FCC regulations have not had sufficient experience in complying with these rules to provide good estimates of their contribution to operating costs. And, summaries of their financial reports to the FCC have not as yet been made public.

Because of these difficulities, most analysts of cable system profitability are forced to rely upon Comanor-Mitchell data--collected during an NCTA study--for estimates of operating costs. We shall be forced to do the same, despite the criticism which has been leveled at their estimates for being too high.[12] We are especially interested in examining the influence of system size upon operating costs per subscriber, and we shall stress the importance of calculating rates of return for only those systems within the range of efficient scale of operation. Very small, inefficient systems must be excluded from any analysis of profitability of "typical" cable systems.

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[11] Don Andersson, op. cit.

[12] For example, see John J. McGowan, Roger Noll, and Merton J. Peck's technical memorandum prepared for the Sloan Commission. 1971.

4. Capital Costs

As in the case of revenues, the timing as well as the magnitude of capital costs are critically important to the calculation of rates of return. The longer a system spreads out its initial investment in a distribution system, the higher is its rate of return for a given pattern of subscriber growth. We shall see that Mitchell assumes that all investment expenditures except house drops are completed at the beginning of the first year. Alternative assumptions which we employ are more realistic.

The capital cost of a cable system is largely dictated by the geographical characteristics of the area served. The density of living units, the necessity of burying utility cables, the type of topography, and the distance from transmitters of signals to be imported are among the most important determinants of the cost of capital facilities per home passed by the cable. But, the average capital cost per home subscriber is obviously dependent also upon the percentage of homes actually subscribing; hence, the predicted rate of penetration is especially important in determining capital outlays per subscriber.

The cost of constructing a mile of cable distribution plant varies considerably from location to location. It is virtually impossible to posit a single estimate for aerial construction or for underground construction, and it is for this reason that we expect subscribers in different communities to face quite different charges. For the purposes of this analysis, however, we shall be forced to adopt Mitchell's technique of positing a typical system and to utilize the same cost data for all calculations.

5. Summary

To summarize this section and to anticipate our criticisms of Mitchell in the next section, the major determinants of rate of return are the prediction of ultimate penetration, the path which the approach to maturity takes, the future pattern of revenues per subscriber, and the magnitude and timing of capital expenditures. On most of these points, Mitchell's assumptions dictate results which, in our view, are biased in the direction of low profitability. We shall correct these sources of bias in preparation for calculating the rates of return which typical cable systems may be expected to enjoy in future years.

C. SELECTION OF APPROPRIATE VALUES FOR THE VARIABLES

1. Calculation of Internal Rates of Return

Mitchell does not inform us of his precise methodology for calculating the yield on cable investment; he merely states that returns are calculated under the assumption of fixed equipment life but infinite franchise life. Thus, he simply replicates the cable system periodically in order to calculate rates of return, but he fails to tell us about the precise timing of revenues and expenditures. Our experiments with Mitchell's data suggest that he must have assumed that all capital expenditures are undertaken immediately preceeding the first day of the year and that revenues and operating costs are recorded at the beginning of each year. As a more satisfactory approach, we have chosen to center all revenues and operating costs at the middle of each year--a compromise which is compelled by the sheer difficulty of allowing for continuous flows and the discounting of these flows--but we retain the assumption that capital outlays occur at the beginning of the year in which they are incurred.

In addition, we calculate returns under the assumption of four-generation life. All expenditures are replicated in the same year they fall due in the first generation, and subscription levels are allowed to grow at the same rate in the second, third and fourth generations--namely, 2 percent per annum. Thus, our computation algorithm solves for r in the following equation:

$$0 = \sum_{t=1}^{15} \frac{p(1)\,(1+g)^{t-1}\,S(t) - OC(t)}{(1+r)^{t-0.5}} + \sum_{t=16}^{60} \frac{p(15)\,(1+g)^{t-15}\,S(15)\,(1.02)^{t-15.5}}{(1+r)^{t-0.5}} - \sum_{t=16}^{60} \frac{OC(15)\,(1.02)^{t-15.5}}{(1+r)^{t-0.5}} - \sum_{t=1}^{60} \frac{K(t)}{(1+r)^{t-1}} \tag{C.1}$$

Our assumption of only four-generation life--of fifteen years each--will have little effect upon the rate of return; one dollar of net revenue sixty years hence, discounted at a rate of 15 percent, has a current discounted value of less than one-tenth of one cent.

2. Revenues

a. Subscription Revenues. Among the most conservative and downward-biased parameters used by Mitchell is his estimate of subscription fees. He posits a monthly fee of $5, plus a secondary fee for additional sets equal to $1, which is chosen by only 20 percent of homes. Thus, he estimates subscribers to contribute an average of only $62.40 each year.

In the random sample of 81 cable systems collected for the purpose of testing the predictive power of various demand equations (to be described below), the average subscriber fee is $5.25 per month or $63 per year. The number of second connections is not known, nor is the secondary subscription fee in most instances. However, published data show that 41 percent of all homes have at least two receivers, and the proportion is growing. We shall assume that 41 percent of subscribers[13] attach two receivers to the cable at an additional cost of $1 per month.

Surprisingly, Mitchell assumes that subscription fees will not grow at all in the infinite life of the franchise. Our sample systems demonstrate an average of 1.2 percent annual growth in monthly fees in the past five years, and this rate of growth is likely to increase in lagged response to the recent inflation. Therefore, in one variant of our calculations we shall utilize a 2 percent growth rate for subscriber fees for the entire forty-five year period. The allowance for revenue growth, among other things, allows us to treat inflation symmetrically--since we use Mitchell's operating-cost data which contain significant escalator provisions in several of the labor categories.

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[13] 1972-1973, Television Factbook.

In the calculations which are presented in the next section, we substitute an annual fee of $63 plus $4.92 for the second connections, or $67.92 for Mitchell's low figure of $62.40.

While our typical current monthly fee of $5.66 ($5.25 + $0.41) per month is $0.46 higher than Mitchell's, it is considerably below the price charged by many systems currently in operation in major markets. In New York City, one system charges $9.95 per month while another--in the more modest section of Manhattan--charges but $6.00. In San Francisco, the monthly fee is $6.25 while in Oakland it is only $4.45 and in Los Angeles it is $7.00. These differences persist despite Mitchell's claim that systems face unitary elastic demand and that increases in the subscription fee to above $5.00 per month will not raise net revenues of the system.[14]

A final fragment of evidence supporting the notion that subscription fees can be raised with salutary effects upon profits is the number of price changes sought by cable operators. Between January and September 1972, 40 systems were reported to have sought increases in their monthly fees and only one asked for a decrease.[15]

An important omission from both our calculations and Mitchell's is the installation fee exacted by cable systems for a household's initial connection to the cable. The random sample of cable systems which we collected for the purpose of testing alternative demand functions lists an average installation fee which is slightly more than $10, but it is well known that many systems waive the installation fee as an incentive to gain additional subscribers. Unfortunately, precise data on the frequency of billing for installation are not available.

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[14] His deductions are theoretically invalid, for he presumes that a firm confronting a demand curve of constant unit elasticity cannot increase price profitability. In fact, it can and should--until it serves but one customer (as long as the second and ensuing customers add to operating expenses of the firm).

[15] Source: TV Factbook Addenda.

The omission of installation fees creates a certain asymmetry in the calculation of rates of return because we have followed Mitchell and included a charge of \$7.50 for each disconnect and reconnect in the "house drops" cost category. Since households are assumed to move once every four years, this adds \$3.75 per year to costs in a steady-state environment. If the installation fee of \$10 were included in our revenues, it would add \$2.50 per year to revenues, in large part offsetting the disconnect-reconnect charges, but without substantive data on the frequency of the levying of installation charges we have decided to ignore this revenue category altogether--leading to a downward bias in calculated rates of return in the next section.

b. Ancillary Revenues. To his modest \$62.40 in subscriber fees, Mitchell adds an equally conservative \$2.20 for advertising revenues. This estimate is also permitted to grow at a rate of zero percent a year, and it is the only allowance for ancillary revenues. In our calculations, we choose to ignore the category of advertising revenues altogether, substituting for them a unitary category of income from all sources, including one which appears likely to dominate advertising revenue for cable operators in a very few years--leased subscription channels.

How remunerative will leased channels prove to cable owners? At this time precise evidence on this question is impossible to muster. One study by the Rand Corporation of the potential Dayton-Miami Valley system[16] projects the leasing of one motion-picture channel and ten educational channels. With no firm basis for their estimate, the Rand researchers simply posit a gross revenue of \$350,000 per year for the motion picture channel--equal to ten times estimated costs. Since the Dayton system is projected to reach an average of 62,830 subscribers during the first ten years, this revenue averages approximately \$5.50 per subscriber per year. In addition, Rand projects another \$350,000 in annual revenue from the leasing of the educational channels at cost, but there is no projection of other leased noneducational channels.

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[16] L. L. Johnson, et al., Cable Communications in the Dayton Miami Valley, The Rand Corporation, F-943 KF/FF, January 1972, p. 2-10.

The Rand estimate is conservative given the economics of motion-picture production and distribution, and the likelihood that other entertainment vehicles will be very attractive when offered by leased channels. Given theater admission prices which average more than $1.25 per seat at present, it would not be surprising if the average cable subscriber would be willing to pay several times this amount for the privilege of viewing new feature films via a leased channel in his home. The Rand estimate of leased-channel revenue is roughly consistent with a monthly charge of $4.50 for 15 new films with one repeat of each during the month and a subscriber enrollment of 50 percent. Alternatively, it may be viewed as being consistent with the sale of $4.50 per subscriber per month in advertising time on the leased channel and it is even more conservative as an average estimate of the attractiveness of this option over the next ten or fifteen years.

Similar examples could be constructed for sports events cultural offerings, or numerous other services, but all would rest heavily upon conjecture at this point. We can only assert that at this moment extra subscriber revenues for cable systems are not very important but that in the very near future they are likely to become significant. Moreover, it is clear from the behavior of buyers and sellers of cable systems that industry personnel expect considerable revenue growth in the near future. Therefore, in the analysis of Section E below, we shall always assume that current revenues per subscriber are derived solely from subscription fees of $67.92 per annum, but we allow these revenues to grow over time as ancillary revenues assume increasing importance.

To summarize, we have suggested that future revenues per subscriber will rise because of modest monthly-fee increases and because of the very considerable potential of ancillary services. Nevertheless, we perform the calculations in the next section under three sets of assumptions about price:

- Price is equal to $67.92 per year for all 45 years.
- Price is equal to $67.92 and grows by 2 percent per year.
- Revenues per subscriber are equal to $67.92 and grow by 4 percent per year.

All three estimates are above Mitchell's gloomy $64.60 per year, ad infinitum, and they are more consistent with the anticipations being discounted by current buyers of franchises as we shall see in Section D below.

3. Subscriber Penetration

Despite the great effort undertaken by Comanor and Mitchell to fit a statistical demand function to a large sample of cable systems' data, Mitchell now drops the "best" equation from the earlier Comanor-Mitchell study in favor of a more recent study by Rolla Edward Park of Rand.[17] He argues that since Park utilizes data for communities having reception capabilities similar to those in the top 100 markets, allows for differences in reception capability, and has gone to the trouble to verify his data with cable operators, his results are superior to those obtained in earlier Comanor-Mitchell study.

Park's study is based upon a sample of 63 systems in markets generally served by three or more commercial signals. He does not and cannot divulge the indentity of these systems since data were obtained on a confidential basis, but he has indicated that the mean size of system is 4,300 subscribers with mean age less than six years. Few very large systems are included--20,000 being the largest system in the sample. He chooses these systems to be "representative" of top-100 market systems, but he excludes all areas in which signal obstruction is deemed to be a problem. Such problems, however, are not uncommon in markets such as New York, Chicago, and San Francisco. These three markets alone account for almost a quarter of the potential subscribers in the top 50 markets.

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[17] R. E. Park, op. cit.

His regression equation is similar to that utilized by Comanor-Mitchell with one important difference: each off-the-air signal is weighted by its distance from the B contour, expressed as a fraction of the radius of the B contour. Thus, distance is taken as an invariant measure of signal reception by households. This assumption is quite dubious on its face for two reasons. First, a station's signal strength is allowed to vary considerably by the FCC and the procedure for estimating the location of the B contour is known to be imprecise. Second, the quality of the local signal is in large part a reflection of the household's investment in antennas. In older areas with older television stations, these antennas are likely to be larger and more sophisticated. In future years, normal attrition of these antennas will make cable more attractive, but examination of any of these markets at present will underestimate future cable penetration.

In estimating his demand function, Park attempts to estimate an exponential maturity factor similar to that attempted by Comanor-Mitchell. He finds that the "best" estimate of this growth factor is equal to $e^{-3.3/t}$ where t is system age in months. Comanor-Mitchell, on the other hand, discovered that e^{-450/t^2} was the best fitting maturity factor. These two estimates--neither of which is utilized by Mitchell in his simulations -- are quite different and give rise to very different paths to eventual system maturity. Surprisingly, Park then proceeds to estimate his equation under the assumption that a system approaches maturity at a linear rate of t/18 for the first eighteen months, reaching maturity at a mere eighteen months. He argues that this gives him his best fit in the penetration equation, and all of his estimates are dependent upon imposing this maturity path upon the penetration expression.

Mitchell uses the parameter estimates of Park's ultimate penetration equation, but imposes his own maturity path, which he neither defends nor supports with statistical evidence. The differences between the Comanor-Mitchell, Park exponential, Park linear, and Mitchell maturity paths are given in Table C-1.

Table C-1

Percentage of Mature Subscriptions in Each Year

Year	Comanor-Mitchell	Park Expon.	Park Linear*	Mitchell*
1	4	76	67	30
2	46	87	100	55
3	70	91	100	80
4	82	94	100	95
5	88	95	100	100
6	91	96	100	102
7	94	96	100	104
8	95	97	100	106
9	96	97	100	108
10	97	97	100	110

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*Park does not address himself to the question of system growth after-maturity is reached while Mitchell assumes that mature systems grow at a rate of 2 percent per annum after "maturity" is reached.

Note that Mitchell's assumption of maturation is more conservative than either of Park's, but Mitchell continues to use Park's mature penetration parameter estimates, imposing his own slower maturation path--a totally indefensible procedure. If Park's mature penetration results are to be accepted, they can only be accepted in conjunction with his linear maturation path.

There are numerous other problems in applying the Park equation to Mitchell's universe of CATV systems. First, the sample Park utilizes is supposed to represent the environment in the top 100 markets. Mitchell uses results for the purposes of projecting penetration in all markets and outside the defined markets. Second, Park finds that the impact of educational stations exceeds the impact of independent stations--a dubious result given all statistics on relative viewing of the two types of outlets. The elasticity of penetration with respect to the educational station variable is 0.204--meaning that an increase in the number of educational stations from 0 to 1 will increase penetration by 20.4 percent (of its *ex ante* value). A similar increase in independent signals will increase penetration by only 14.5 percent. Finally, Park makes no allowance for local origination even though in a subsequent publication he has argued that ambitious local originations will lead to a substantial increase in penetration in the Dayton-Miami Valley area.[18]

Because the form of the penetration equation (and its maturation factor) is important in predicting cable system profitability, we shall examine each published demand equation's ability to predict actual penetration for a randomly drawn sample of cable systems from the *Factbook*.

Our sample of CATV systems was obtained by selecting a system at random from the 1972-1973 *Factbook* and choosing every twentieth system sequentially thereafter. In this manner, we collected data on 153 systems, but the data required for fitting the Park and Comanor-Mitchell demand equations were incomplete for 66 of these (usually because the number of homes passed by plant was unavailable). Of the remaining 87, six were found to have erroneous data on homes passed; therefore, we were left with a sample of 81 systems--of which 20 were located in the top 100 markets.

None of the three demand equations predicted demand any better than one could by a random process. All three were rather strongly biased downward, and all three had root mean square errors in excess of the standard deviation of the distribution of actual penetration rates. The performance of each demand equation is summarized in Table C-2.

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[18] L. L. Johnson, et al., op. cit., Addendum 2A.

Table C-2

The Performance of Alternative Statistical Demand Functions

	Park-Linear Growth	Park-Mitchell's Growth	Comanor-Mitchell	Actual
All Markets				
Mean Penetration	0.498	0.516	0.402	0.560
Downward Bias	0.062	0.044	0.158	--
Standard Deviation	--	--	--	0.223
Root Mean Square Error	0.260	0.290	0.270	--
Top 100 Markets				
Mean Penetration	0.341	0.322	0.331	0.448
Downward Bias	0.106	0.126	0.117	--
Standard Deviation	--	--	--	0.182
Root Mean Square Error	0.249	0.299	0.262	--

Mitchell's adaptation of Park's equation performs the worst of all, providing the largest values for root mean square error. For the settings which Mitchell posits in his recent paper, Comanor-Mitchell provides much higher estimates of major penetration than the Park equation, but even these estimates are considerably below those derived by a group of Major System Operators (MSO's) themselves. These predictions appear with each demand function's estimates in Table C-3.

Table C-3

Mitchell's Setting for Cable Systems
Alternative Penetration Projections at Maturity

Signal Configurations	Park Middle	Park Edge	Comanor-Mitchell	MSO Predictions for Mature Penetration in 1987[1]
Top 50 Markets				
1	.278	.387	.477	
2	.253	.379	.503	.648
3	.222	.362	.458	
Markets 51-100				
4	.242	.365	.492	
5	.268	.387	.458	.653
6	.311	.452	.468	
Markets 101+				
7	.293	.412	.496	

[1] These estimates are taken from Andersson, op. cit.; 1987 projections for penetration are coverted to mature penetration by utilizing Mitchell's growth path for homes passed in 1983-87. Thus, in the top 25 markets, 1987 penetration is 58.6 percent, but given an average increase of 882,100 homes passed per year in 1982-87, mature penetration is estimated to be 64.6 percent in these markets.

Source: Mitchell, Table 4, without exclusivity calculation.

Given the poor performance of all three demand equations, we do not feel that use of any of them is justified in predicting future penetration for the purpose of calculating rates of return on cable investment. The considerable downward bias in each would create a similar downward bias in profitability calculations. Therefore, we are forced to rely upon the cable system operators' own projections of demand even though these estimates are derived from cable systems which provide little significant origination and only a minor amount of special services such as motion pictures or sports events by leased channels. When these services reach fruition, we can expect the attractiveness of cable to be enhanced considerably and penetration to rise accordingly.

Exclusivity. In its 1972 rulemaking, the FCC provided exclusivity protection to local stations in the top 100 markets by requiring that cable systems black out imported signals when they contain programs which are also shown by local stations in a specified period. In order to allow for the effect of this exclusivity protection upon cable penetration, Mitchell reduces the number of imported signals by a proportion which purportedly reflects the percentage of time which the signals will be blacked out. Unfortunately, this calculation is based upon only the most scanty evidence assembled by Park.[19] More importantly, there is no evidence that penetration will respond proportionately to reductions in the time independent signals are available. Thus, we do not attempt to replicate Mitchell's conjecture, but instead allow for the importation of two additional independent "standby" signals by building in six additional microwave hops (for importing the two signals) to our capital costs.

4. Operating Costs

The calculation of the necessary operating costs of cable systems is far from a simple matter. Comanor-Mitchell provide a very detailed breakdown of all operating costs of systems which they believe to be typical, but these data are not fitted by standard statistical techniques to the operating performance of extant systems. Rather, they are judgments derived by the authors after consultation with their clients and others in the industry. Not surprisingly, they have been viewed by some critics as rather high, but there is only scant evidence in published financial reports with which to compare them.

An important source of the apparent economies of scale in Comanor-Mitchell lies in the assumption that all cable systems with more than 3,500 subscribers will undertake the same origination expenses. This origination activity contributes $43,000 per year to operating costs and $38,000 to capital costs for each system. Thus, for a 10,000 subscriber system, origination alone contributes nearly $5 per subscriber per year to total costs, but for a 25,000 subscriber system, the additional cost is only $2 per subscriber.

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[19] R. E. Park, The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations, The Rand Corporation, R-1057-FF/MF, June 1972.

A review of the financial statements of five major M.S.O.'s in the past 3 years reveals that C-M have undoubtedly overestimated the economics of large size inherent in cable system operation. Table C-4 summarizes the performance of these M.S.O.'s and Table C-5 provides a comparison of each company's operating costs with the estimates which derive from the C-M cost parameters for systems of the same subscriber penetration, average size, and population density. It is quite clear that C-M provides a reasonable estimate only at an average size of 10,000 subscribers, overestimating costs for smaller systems and underestimating costs for larger systems. Since we are forced to rely upon the C-M operating cost data for our simulations in Section E, below, we present results only for a typical 10,000 subscriber system. Any other results based upon C-M cost parameters would be seriously biased.

5. Capital Costs

Since cable television is an extremely capital-intensive activity, Mitchell's assumptions about capital expenditures are crucial to his rate of return calculations. There are four major reasons why his estimates of capital expenditures lead to a downward bias in calculated profitability:

- He assumes that underground cable percentages are far above actual and prospective underground percentages in the most dense markets.

Table C-4

Operating Costs for Four MSO's

1969-1972

	Company	Period	Average Penetration (Subscribers Homes Passed)	Average Homes per Mile	Total Subscribers	Average System Size	Cost per Subscriber
A	Cable Com General	9/69 to 6/70	.499	75	103,000	3,800	$37.20
B	Cox	1970	.506	95	197,000	14,900	36.56
C	H&B American	7/69 to 12/69	.537	86	245,000	6,300	34.90
D	Cypress	6/71 to 3/72	.642	83	165,000	11,400	33.93
E	Columbia Cable	9/71 to 3/72	.492	81	71,000	8,500	37.04

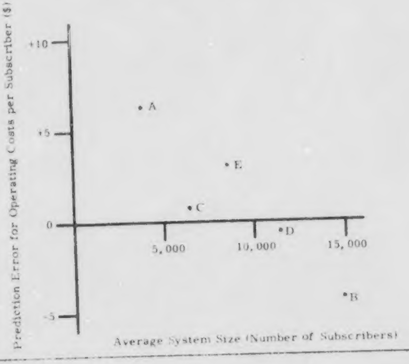
Source: A American Stock Exchange Listing Application No. 8797, October 16, 1970.
B American Stock Exchange Listing Application No. 9031, March 18, 1971.
C American Stock Exchange Listing Application No. 8739 (Teleprompter), September 14, 1970.
D New York Stock Exchange Listing Application No. B-2188, September 12, 1972.
E Securities and Exchange Commission, Registration Statement S-1, No. 2-44751, June 23, 1972.
Television Factbook, Annual Issues.

Table C-5

Actual and Comanor-Mitchell Predicted Values for Operating Costs for Four Major MSO's

	Company	Operating Costs per Subscriber Current Dollars	Operating Costs per Subscriber 1970 Dollars (Assuming 5% Annual Inflation)	Comanor-Mitchell Projections	Projected Error in 1970 Dollars
A	Cable Com General	$37.20	$37.90	$44.48	$6.58
B	Cox	36.56	36.56	32.49	-4.07
C	H&B American	34.90	36.14	37.11	0.97
D	Cypress	33.93	31.75	32.39	-0.64
E	Columbia Cable	37.04	34.26	37.35	3.09

Predicted Error Versus Average System Size



- He assumes that the entire plant is built at the beginning of the first year.
- He fails to account for a less expensive method of construction in dense middle markets.
- He asumes that the entire plant is rebuilt in each generation even though some components of capital expenditure may never be replicated after initial construction.

We shall take issue explicitly with the first two of these assumptions, citing data collected from middle-market systems either in operation or under construction at the present time. In addition, we shall cite a recent Rand study of the prospects for cable in the Dayton-Miami Valley area and the projected temporal pattern of construction for this system.[20] The third and fourth items will be discussed, but we do not alter the assumptions made by Mitchell in these respects in our calculations in Section E, thus again biasing our results downward.

a. Underground Construction. Mitchell's assumptions about the extent of underground construction are unrealistic. He predicts that the average percentage of underground construction will vary by market and by proximity to the middle of the market. A tabulation of these percentages appears as Table C-6.

Table C-6

Mitchell's Assumptions on Underground Construction Percentages

Market	Location Middle Systems	 Edge Systems
Top 50	20%	10%
51-100	10	5
101+	5	5
Outside Markets	0	0

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[20] L. L. Johnson, et al., op. cit.

How does he justify the 20 percent datum for major-market middle systems? By noting that the following "typical" systems have required extensive underground construction:

Table C-7

Mitchell's Citation of Typical Systems Requiring Extensive Underground Construction

City	Percentage of Cable Underground
Boston	51%
Brookline	40.5%
Chelsea	17%
Somerville	21.6%

All of these systems are located in the sixth largest market--Boston, Massachusetts. Mitchell appends these data as Table A-2, but he neglects to inform us that:

1. Franchises have been awarded in only Chelsea and Somerville. In Boston and Brookline, system design and franchise awards have not been consummated.

2. In Somerville, current construction plans call for very little digging of new trenches for underground cable since existing telephone company ducts can be used. All told, only 7.3 percent--not 21.6 percent--will be placed underground in existing ducts and in new conduits.

3. Chelsea plans to bury approximately 20 percent underground in existing utility ducts. No new trenching is planned.

4. City engineers in Boston are emphatic in stressing that no new underground construction will be allowed in Boston. All underground cable will be placed in existing utility ducts.

5. Brookline has not made any final decision on the extent of underground CATV system required, but it is likely that 20 percent of system will be laid underground in existing utility ducts.

In short, Mitchell's "documentation" of underground cable percentages is substantially in error. City officials in each of the four cities cited are frank to admit that little new trenching will be undertaken in their communities because of its prohibitive private and social costs.

What is required is substantial documentation of the extent of underground construction in "typical" systems--especially those in the largest, most dense markets. In order to shed light upon this question, we attempted to contact all of the systems which are either operating or under construction in the central city of the top 50 markets with the exception of New York City. The responses which we received by telephone are documented in Table C-8.

Table C-8

Underground Cable Percentages
Core Cities in Top 50 Markets

City	Current Underground Percentage	Prospective Underground Percentage
Akron, Ohio	Less than 5%	Less than 5%
Columbus, Ohio	Less than 5%	Less than 5%
Buffalo, N.Y.	Less than 1%	Perhaps as much as 6%
St. Petersburg, Fla.	0%	0%
Atlanta, Ga.	0% (except leads to apt. complexes)	0%
Seattle, Wash.	10-15%	-
Albany, N.Y.	-	approximately 2%
Charlotte, N.C.	10%	10-11.5%
Anderson, S.C.	Less than 1%	Less than 1%
Asheville, N.C.	0.1%	Less than 0.5%
San Francisco, Calif.	16%	Less than 12%
Oakland, Calif.	23%	-
Los Angeles, Calif.	23%	-
San Jose, Calif.	23%	-
Winston-Salem, N.C.	5%	Up to 7-8%
Salt Lake City, Utah	0%	0%

Outside California and New York City, underground cable percentages rarely exceed 5, and in California--where new housing construction is especially important--underground cable costs are often much lower than those specified by Mitchell because the television cable is buried at the same time that other utility lines are laid. Thus, there is little sound data from actual or prospective cable systems that underground percentages will "typically" average 10 or 20 in even the largest markets. In cities such as New York, Washington, or San Francisco, where topography and other unusual circumstances dictate burying cable at great expense, higher subscriber fees will be paid by television homes. But, these cities should not be used as the model for "typical" systems in calculating rates of return. To do so would bias the results severely.

b. Timing of Capital Expenditures. A second assumption which leads Mitchell to underestimate the internal rate of return on cable systems is his assumption (and the assumption of Comanor-Mitchell) that the entire plant is constructed at the beginning of the first year. In virtually every system, construction is phased out over more than one year, and in many completion requires three or more years. In their study of the Dayton-Miami Valley system, the Rand researchers assumed that the distribution system would be built in a three-year period, with 21 percent completed in the first year, 44 percent built in the second year, and 35 percent in the third year. We utilize an intermediate pattern in our calculations in the next section, a pattern which dictates higher rates of return since it reduces the present value of capital expenditures at any calculated discount rate.

Mitchell assumes that his large underground cable percentages will be achieved at a cost of $15,400 per mile because he implicitly assumes that large cities will allow and even require cable companies to trench and lay conduit throughout the core city area. In fact, this is not likely to occur in many large cities because of the costs and discomforts created by the trenching and filling process. Many cities require, instead, that the telephone or electric utility company provide conduits for other purposes. These conduits are laid when other utility lines are laid, and cable operators may be required to use them.

In cities such as Seattle, San Jose, and Los Angeles, underground cable is laid at the same time utility companies bury their cables. This leads to much lower costs than independent de novo construction hypothesized by Mitchell. Even where underground construction is undertaken independently, the cost of laying cable can vary enormously. Oakland is laying 38 channels of cable underground at an estimated cost of $19,000 per mile while San Francisco, across the bay, is encountering costs of up to $50,000 per mile and more. These differences are reflected in different monthly charges--$4.45 for Oakland and $6.25 for San Francisco.

Where cable is simply strung through underground ducts, the cost per mile may even be lower than aerial construction. One study conducted by the Stanford Research Institute[21] found that this type of construction cost only $3,000 per mile, or at least 25 percent less than aerial construction. Maintenance costs may be greater for this alternative, however, since major repairs or alterations may require the assistance of other utility companies who share the same ducts.

In Mitchell's rate of return calculations, it is assumed that the entire plant is rebuilt in each 15-year generation. Moreover, because of the assumption noted above, this plant is replicated at the beginning of each generation. Clearly, these assumptions overstate actual capital expenditures. Even if most of the cable plant has a 15-year life in the face of extensive maintenance built into operating costs, not all of the plant requires rebuilding. Trenches dug in the first year and conduit laid in these trenches do not have to be replicated in year 16. Many of these conduits will survive for several generations, and some may not require rebuilding in the foreseeable future. Moreover, tower expenses need not be replicated every 15 years. In some cases, new technology will dictate replacement of capital equipment but only if operating costs are so reduced by the improvement that average costs of operation are less than incremental costs with the older equipment. Thus, to the extent that rebuilding is dictated by new developments, operating costs should be reduced accordingly. Mitchell does not do this; he simply reproduces the plant in toto each 15 years--a methodology which obviously lowers the realized rate of return.

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[21] Stanford Research Institute, Business Opportunities in Cable Television, March 1970.

In our calculations in Section E we shall make the reasonable assumption that the underground percentage in the typical system is 5 percent. Moreover, we shall phase the initial (and subsequent replication of) investment over two years, a pattern which the Rand Dayton Study uses for each of the sectors of its enormous prospective system. Unfortunately, we cannot present very firm data on the percentage of cable which will be laid in utility ducts nor on the share of plant investment which will not require replication. Therefore, we utilize Mitchell's data on aerial and underground costs per mile and, like him, assume that the entire plant is rebuilt each generation even though we know that these assumptions will lead to conservative estimates of the rate of return.

D. THE RATE OF GROWTH OF PROFITS EXPECTED BY CABLE OWNERS

Since any calculation of future profitability of cable systems depends crucially upon the magnitude of future price-cost conditions, estimates based upon current perceptions of these data are most precarious. Without a sound estimate of the price-cost margin in future years, it is unlikely that one will be able to predict the prospective rates of return for cable systems operating in different environments.

In this section, we present the strongest possible predictors of future price-cost margins--the estimates revealed by system owners themselves in their purchases and sales of extant systems. In the past two years, a number of acquisitions--large and small--have taken place, and the prices at which these systems sell reflect the discounted present value of all anticipated future profits.

As Mitchell has posited, cable system owners should receive a 15 percent return on investment before corporate income taxes to cover their costs of capital. Thus, the present value (PV) of any new system is equal to net revenues over all future time discounted at a rate of 15 percent. This observation may be written:

$$\text{(D. 1)} \qquad \frac{PV}{S} = \int_{0}^{\infty} [(R_o - OC_o)e^{gt}]\, e^{-rt} dt - K(15)e^{-15r} - K(30)e^{-30r} - \ldots.$$

where PV/S is present value (or price paid) per subscriber, R_o is current revenues per subscriber, OC_o is current operating costs per subscriber, and K ( ) is the periodic recapitalization of plant required every generation. Net revenues, R_o-OC_o, are allowed to grow at a rate g, the rate of discount is denoted r, and the length of a generation is 15 years.

If we assume that the plant must be rebuilt every 15 years, we may translate this requirement into an annual capital charge. The present value of outlays required to rebuild the system every fifteen years for a system which is one-half generation old is equal to the replacement cost of assets times $e^{-7.5r} + e^{-22.5r} + e^{-37.5r} + \ldots$. At a 15 percent interest rate and reproduction costs of assets of $180 to $200 per subscriber,[22] the annual capital charge required for this typical plant is in the range of $9.80 to $11.10 per subscriber. We utilize a figure of $10.50 in the calculations below. We may now calculate the annual rate of growth (g) in net revenues by rewriting the present value formula as:

$$\text{(D.2)} \qquad \frac{PV}{S} = \frac{R_o - OC_o - 10.50}{.15 - g}$$

We know that current revenues per subscriber are equal to approximately $67.92 while operating costs for median size systems are approximately $32, according to Comanor-Mitchell data. Thus, the rate of growth in net revenues per subscriber is easily found to be:

$$\text{(D.3)} \qquad g = .15 - \frac{25.42}{PV/S}$$

If we have information on the price per subscriber paid by firms acquiring cable systems, we can calculate the rate of growth which they are anticipating.

In order to obtain an estimate of price paid per subscriber, we have collected information on all sales of systems for which we could find complete data in the financial press in 1971 and 1972. A total of 17 such sales were found, ranging from one system selling at $840,000 to 46 systems selling for a total price of $88.5 million. The 17-transaction sample has a reported 625,000 in current subscribers.

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[22] Ron Andersson, The CATV Industry, et al., loc. cit., estimates current investment per home passed at $112. If penetration at maturity is equal to 0.65, capital costs per subscriber are equal to $172. If penetration fails to rise above its current level of 55 percent, capital costs per subscriber will be $204.

The data on current subscriber levels for all systems purchased were converted to "mature" subscription levels by dividing reported subscribers by a maturation factor developed by Comanor-Mitchell, e^{-450/t^2}, where t is system age in months. This provided an estimate of slightly more than 762,000 subscribers at maturity. Total purchase prices for the 17 companies aggregated $350 million in stock, cash, and liabilities assumed, or $460 per mature subscriber. However, there was considerable variance about this mean figure, reflecting obviously different investment situations--differences in municipal regulation, local costs, subscription prices, and future growth potential. It might be that some systems carry franchise rights with them which are quite valuable, allowing the system owner to wire new areas at large prospective future profits. Assume, for instance, that a further 100 percent growth in homes passed is envisioned in the typical sale--certainly a very generous estimate. The profitability of these incremental subscribers is much less than that for current subscribers who reside before plant already built. If 55.3 percent of the new homes passed are enlisted as subscribers, the system will be faced with investing in new cable plant at a current cost of approximately $150 per subscriber.[23] This adds $25.17 to the annual $32 in operating costs, leaving only $10.73 per year in excess monopoly profits (above the 15 percent rate of return required by investors). Thus, assuming each sale involves the prospect of attracting 0.553 subscribers for each mature subscriber currently passed by the existing plant, we should attribute $5.93/($33.27 + 5.93) or 15 percent of each dollar of purchase price to growth possibilities. This reduces our estimate of purchase price per mature subscriber to $391.

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[23] Since Comanor-Mitchell estimate distribution costs to be more than 70 percent of all investment, $150 of the current $203 capitalization per subscriber is required to wire new homes.

We are now in a position to calculate the annual rate of growth of net revenues per subscriber which is being capitalized into franchise purchases by recent buyers. Referring back to (D. 3) we may easily solve for g:

$$g = .15 - \frac{25.42}{391} = .085 \qquad \text{(D.4)}$$

Thus, current buyers and sellers of systems comprising more than 10 percent of the current industry--and including firms such as Teleprompter, Viacom, and Cox Cable--are paying prices which are consistent with an expected 8.5 percent annual rate of growth of cash flow per subscriber. If operating costs were not to grow at all in the future, revenues would have to grow by 8.5 percent in order to justify their well-informed expectations.

The above estimate of the rate of growth expected by cable owners themselves is a minimum estimate given our conservative assumptions that:

- Operating costs are but $32.00 per subscriber--a datum consistent with a system size of 15,000 to 20,000 subscribers according to accounting statements and Comanor-Mitchell data.
- All systems purchased achieve maturity instantly.
- Each system has franchise rights which will yield another 0.55 subscribers for each subscriber attached to the current plant at maturity.

Since the average system sold was smaller than 15,000, operating costs may be higher and current net revenues smaller than that calculated in D.3. Moreover, any protracted adjustment to mature penetration levels reduces the base from which net revenues per system must grow and, therefore, increases the net growth required to justify the price paid for the system. Finally, our assumption of one additional subscriber in areas yet to be wired for every mature subscriber before extant plant is a maximum estimate given the franchises acquired. The total number of homes in franchised areas not yet wired by the firms acquired in these 17 transactions is estimated to be approximately 700,000 from 1970 Census of Population counts. Even if all of these homes are wired eventually, they will not equal total homes subscribing at maturity in currently wired areas. Moreover, our calculation requires that these homes be wired instantly--otherwise, the required rate of growth to justify the system purchase price must be higher.

Unless cable owners are willing to accept a lower rate of return than 15 percent on capital before income taxes, we must conclude that their actions reveal that they are expecting perpetual growth of net revenues per subscriber in excess of 8.5 percent with no increases in cost. This increase is likely to be realized in the form of new services which add to both costs and revenues, but we cannot on the basis of current evidence estimate the precise magnitude of each during future years.

This 8.5 percent growth rate for net revenues is approximately consistent with a rate of growth of gross revenues of 3 to 4 percent per annum with no cost escalation. Given the built-in wage escalators in our operating-cost formulation, we shall take 4 percent as the maximum growth rate of total revenue per subscriber, but we present estimates for a more modest growth rate of 2 percent as well.

E. RESULTS OF CALCULATIONS

In this section, we calculate the internal rates of return on cable systems in different operating environments under the revised assumptions described above. We utilize Mitchell's assumptions and data for all but the following parameters:

1. Penetration at Maturity - a { 0.648 in the top 50 markets, 0.653 in all other markets.
   b { 0.553 in the top 100 markets, 0.653 in all other markets.

2. All operating costs and revenues are discounted from the middle of each year. Capital costs are discounted from the beginning of the year in which they are incurred.

3. All distribution plant investment is spread over two years--50 percent in the first year; 50 percent in the second year.

4. Underground cable percentage - 5 percent in all markets.

5. Twenty-channel capacity for all systems; even those outside the top 100 markets.

6. Exclusivity Effects - Two additional independents imported via three microwave hops each as standby capacity to substitute for blacked-out independents.

7. Origination - All systems have standard origination as defined by Mitchell.

8. Annual Revenue per Subscriber - $67.92 which grows at a rate of 0 percent, 2 percent, and 4 percent in three different calculations.

9. The number of subscribers increases at an annual rate of 2 percent in years 16 through 60.

Clearly, our assumptions on mature penetration and subscribe revenues are more generous than Mitchell's and they lead to higher calculated rates of return. However, as we have argued in Section C, these assumptions are more consistent with cable system owners' projections and currently reality.

We utilize the cable system owners' projections for penetration in 1982 for our first calculations, employing the datum for markets 51-100 for all markets outside the top 100. These calculations embody more optimistic penetration assumptions for the top 100 markets, but in some cases we are more conservative than Mitchell for the smaller markets. As an alternative projection, we utilize the pessimistic assumption that, despite growth potential, penetration in the top 100 markets will remain at 55.3 percent.[24]

For the path toward maturity, we utilize the growth path used by Mitchell despite its lack of statistical foundation. We feel that this path is a reasonable compromise between Comanor-Mitchell and Park. In addition, it is quite similar to the one utilized by Park in his Dayton-Miami Valley predictions.[25]

Revenues per subscriber take three forms--all beginning with $67.92 in the first year. In the first variant, it is assumed that there is no net growth. In the second, revenues per subscriber grow at an annual compound rate of 2 percent while in the third they grow at 4 percent. These rates of growth are consistent with our observations about prospective subscriber fee increases and future sources of ancillary revenues. More importantly, they are conservative reflections of revenue growth discounted by buyers and sellers of systems in the past two years.[26]

Equally important and also leading to higher rates of return are our assumptions concerning cable investment and its timing. While we use Mitchell's data on costs per mile of each type of cable plant--

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[24] Don Andersson, op. cit.

[25] L. L. Johnson, et al., op. cit., Paper #2.

[26] See Section C above for an estimate of growth rate anticipations.

aerial and underground--we phase the investment in that plant over two years in accordance with our observation that few plants are ever completed in a single year. In addition, we allow for a maximum of 5 percent of cable underground for a typical system given the observation that few systems currently under construction or in operation in major markets have more than this percentage of their plant buried in underground conduits.

Minor changes involve exclusivity and origination. We simply allow the importation of two additional standby independent signals to offset the effects of exclusivity protection afforded local stations. While this may not allow the cable system to prevent blacking out one channel at all broadcast hours, it will greatly offset any effect of exclusivity protection upon subscriber penetration. The cost of importing each additional signal is included in the additional three microwave hops per station required.

For origination, we utilize the Mitchell "standard" origination--requiring capital costs of $38,000 and annual operating costs of $43,000. Mitchell, on the other hand, utilizes a minimum origination expenditure for systems of fewer than 10,000 mature subscribers, but we exclude these smaller systems from our results.

A few minor differences exist between our calculations of operating and capital costs and those of Comanor-Mitchell upon which Mitchell relies. All of these derive from the difficulty in translating the Appendix description of cost parameters in Comanor-Mitchell into actual cost data. For employee benefits, office rentals, and house drops, our cost data differ to a minor degree with the Comanor-Mitchell calculations. These differences are minor and have no perceptible effect upon calculated rates of return.

Otherwise, we utilize the Comanor-Mitchell cost data for the calculations reported below. Instead of replicating the plant over an infinite horizon, we simply allow for four generations of 15-year plant life. This reduces the rate of return to a very minor degree given the present value of net revenues realized 61 or more years from the present.

In order to demonstrate the effect of alternative proposed copyright fee schedules, we calculate the rates of return under the four different assumed copyright fee schedules employed by Mitchell:

#1 represents no copyright fee payments;

#2 represents 1/2 of number 3;

#3 represents the "McClellan formula" in S. 644;*

#4 represents 2 times number 3.

These four alternative fee schedules are detailed in Table E-1.

Table E-1

Copyright Fee Schedule

	Copyright Fee Schedule Number (Fee as a % of Gross Revenue)			
	#1	#2	#3	#4
Percentage of Revenues First $160,000	0%	0.5%	1.0%	2.0%
Percentage of Revenues In Excess of $160,000 up to $320,000	0%	1.0%	2.0%	4.0%
Percentage of Revenues in Excess of $320,000 up to $480,000	0%	1.5%	3.0%	6.0%
Percentage of Revenues in Excess of $480,000 up to $640,000	0%	2.0%	4.0%	8.0%
Percentage of Revenues in Excess of $640,000	0%	2.5%	5.0%	10.0%

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*S. 644 relates fees to subscription revenues. For simplicity, we have related the fee formula to gross revenues. This will tend to understate slightly the calculated profitability of the systems when copyright fees are included.

Before presenting the calculated rates of return for various systems under our assumptions, however, we first examine an arbitrarily chosen system from Mitchell's calculations to demonstrate the effects of our assumptions upon realized rates of return. Our choice for this purpose is a 25,000 system in the middle of the top 50 markets--Line 1 in Table 4 of Mitchell's paper. The analysis is summarized in Table E-2.

Mitchell calculates a 10.4 percent rate of return in the absence of copyright fees for this system. Our attempt to replicate his assumptions while centering all revenues and operating costs in the middle of each year leads to an increase in the rate of return from 10.4 percent to 11.7 percent.

Reducing the percentage of underground cable to 5 percent increases the rate of return by another 1.9 percent (from 11.7 and 13.6 in line 1 of Table E-2). Spreading distribution plant investment over two years increases the rate of return by another 0.4 to 0.6 percent. Thus, making all of our assumptions except for revenues per subscriber, mature penetration, and the method of countering the exclusivity rule increases the rate of return from 10.4 percent to 17.6 percent.

Line 2 demonstrates the effect of increasing penetration to 0.278 as the assumption of loss in subscribers due to exclusivity protection is dropped. Instead, we add two imported independent signals, requiring three microwave hops each. The additional microwave costs offset the increase in penetration and the rates of return change only marginally.

When we allow revenue to increase to $67.92 per subscriber per year in line 3, the rates of return rise to 13.0 and 15.1 percent if investment is completed in the first year and to 13.4 and 15.6 percent with investment spread over two years.

Table E-2

Sensitivity of Rate of Return Calculation
to Changes in Parameters

(No Copyright Fees)

25,000 Subscriber System -- Middle of Markets 1-50

	Cash Flow Discounted at Beginning of Year	Cash Flow Discounted in Middle of Year Investment Completed in Year One		Cash Flow Discounted in Middle of Year Investment Completed in Two Years	
	Underground =20%	Underground =20%	Underground =5%	Underground =20%	Underground =5%
1. Mitchell's Calculation: Revenue = $64.60 per Subscriber Penetration at Maturity = .272	10.4%	11.7%	13.6%	12.1%	14.2%
2. Our Calculation: Revenue = $64.60 per Subscriber (Additional Microwave Hops) Penetration at Maturity = .278		11.8%	13.8%	12.1%	14.1%
3. Our Calculation: Revenue = $67.92 per Subscriber Penetration at Maturity = .278		13.0%	15.1%	13.4%	15.6%
4. Our Calculation: Revenue = $67.92 per Subscriber Penetration at Maturity = .648					28.5%
5. Our Calculation: Revenue = $67.92 per Subscriber growing at 2% per year Penetration at Maturity = .648					32.8%
6. Our Calculation: Revenue = $67.92 per Subscriber growing at 4% per year Penetration at Maturity = .648					36.8%

Finally, lines 4, 5 and 6 demonstrate the effect of utilizing all of our assumptions, including a mature penetration of 64.8 percent. The rate of return rises to 28.5 percent in the face of $67.92 per subscriber per year with no growth, and it rises to a heady 36.8 percent in the face of 4 percent growth. Thus, our most favorable assumptions have produced a trebling of the rate of return for this sample system, but more than half of this increase occurs even if we assume that revenues per subscriber do not increase from today's level.

Turning to our own calculations embodying the assumptions detailed at the outset of this section, we obtain much larger rates of return than Mitchell. Tables E-3 through E-7 present the results for each market category. Appendix A contains the detailed cash flows from the computer printouts for these and other simulations.

Clearly, if cable systems are able to achieve the 64.8 to 65.3 percent subscriber penetration which the owners are expecting, all systems of 10,000 subscribers will be able to earn considerably more than the required 15 percent on investment even after a copyright fee schedule such as #4 is imposed. With a modest growth rate of 2 percent applied to revenues per subscriber, the lowest rate of return before copyright fees is 18.62 percent. With a 4 percent growth rate, this rises to 22.72 percent.

If we make the more pessimistic assumption that cable systems in the top 100 markets will not be able to improve upon their average subscriber penetration of 55.3 percent, rates of return fall slightly, but no system with 10,000 subscribers earns a return of less than 18.29 percent with 2 percent revenue growth and no copyright fees. At a 4 percent growth rate, the minimum rate of return rises to 22.36 percent.

We also estimated the profitability of larger and smaller systems, utilizing the C-M cost data, and our results were predictable. For 25,000 subscriber systems, for example, the rates of return were consistently in excess of 25 percent and often above 30 percent while for smaller systems with but 5,000 subscribers, the rates of return were in the range of 12 to 18 percent. These enormous differences derive from the C-M overestimates of the efficiencies of size, of course, but even with this substantial bias incorporated, the rates of return for small systems were greater than the cost of capital when 4 percent revenue growth was assumed.

One might also ask how more pessimistic penetration assumptions affect our calculations. Even if penetration at maturity is expected to be but 40 percent of homes passed in future years for a *typical* cable system, 10,000 subscriber systems will realize rates of return between 18.33 and 23.35 percent under our assumptions with 4 percent growth in revenues per subscriber. Combining this exceedingly low penetration figure with only a 2 percent growth rate in revenues per subscriber yields rates of return of 14.28 to 19.21 percent.

It is clear from these comparisons, that projected growth in subscriber revenues are critical to any calculation of profitability. While our assumptions of 2 percent and 4 percent are not particularly staggering they overwhelm Mitchell's projected rate of 0.00 percent growth. Since we are projecting revenues and costs over an infinite horizon, it is particularly important to allow for the probability that the average subscriber in the year 2000 will contribute more than $64.60 per year to revenues even after adjusting for inflation. Mitchell's method applied to the telephone industry at a similar stage in its development would have led to an estimate in 1915 that revenues per telephone installed would remain at $30 forever without improvements in productivity! Obviously, such a projection would have been a woefully inadequate guide for regulatory policy in the ensuing 58 years.

Another striking result of our calculations is the minor effect of our alternative copyright fee schedules. This result obtains simply because the average fee paid in the first few years is a very small percentage of revenues. Even schedules #3 and #4 provide for payments of only 1 to 3 percent and 2 to 6 percent of revenues, respectively, in the first five years for systems with only 10,000 subscribers. This percentage increases as the revenues grow, but none of our calculations posit average payments of as much as even 5 percent per year in these first five years; thus, the effect of the copyright fee schedules currently under discussion is *de minimis* from the standpoint of estimating current profitability.

Table E-3

Rates of Return in Middle-Market
10,000 Subscriber Systems in Top 50 Markets

	Copyright Fee Schedule			
	#1	#2	#3	#4
Subscriber Penetration at Maturity = 0.648				
Revenues per Subscriber = $67.92 per Year*	18.61%	18.13%	17.65%	16.66%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	23.47%	23.01%	22.54%	21.60%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	27.63%	27.16%	26.68%	25.72%
Subscriber Penetration at Maturity = 0.553				
Revenues per Subscriber = $67.92 per Year*	17.17%	16.71%	16.24%	15.29%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	22.09%	21.65%	21.20%	20.31%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	26.24%	25.78%	25.34%	24.43%

*with no growth over time

Other Variables:

Density: 200 homes/mile

Imported Signals: 2 independent, 1 duplicate network, 1 educational

Microwave Hops: 15

Underground Cable: 5%

Investment Period for Distribution System: 2 years

Table E-4

Rates of Return in Edge-Market
10,000 Subscriber Systems in Top 50 Markets

	Copyright Fee Schedule			
	#1	#2	#3	#4
Subscriber Penetration at Maturity = 0.648				
Revenues per Subscriber = $67.92 per Year*	16.30%	15.85%	15.40%	14.48%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	21.22%	20.79%	20.37%	19.51%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	25.33%	24.90%	24.47%	23.60%
Subscriber Penetration at Maturity = 0.353				
Revenues per Subscriber = $67.92 per Year*	14.76%	14.34%	13.90%	13.02%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	19.76%	19.36%	18.96%	18.16%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	23.87%	23.46%	23.06%	22.24%

*with no growth over time

Other Variables:

Density: 150 homes/mile

Imported Signals: 2 independent, 1 duplicate network, 1 educational

Microwave Hops: 15

Underground Cable: 5%

Investment Period for Distribution System: 2 years

Table E-5

Rates of Return in Middle-Market
10,000 Subscriber Systems in Market 51-100

	Copyright Fee Schedule			
	#1	#2	#3	#4
Subscriber Penetration at Maturity = 0.653				
Revenues per Subscriber = $67.92 per Year*	16.39%	15.94%	15.48%	14.56%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	21.30%	20.87%	20.45%	19.59%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	25.42%	24.98%	24.55%	23.67%
Subscriber Penetration at Maturity = 0.553				
Revenues per Subscriber = $67.92 per Year*	14.82%	14.39%	13.95%	13.07%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	19.82%	19.42%	19.01%	18.21%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	23.92%	23.52%	23.11%	22.29%

*with no growth over time

Other Variables:

Density: 150 homes/mile

Imported Signals: 2 independent, 1 educational

Microwave Hops: 15

Underground Cable: 5%

Investment Period for Distribution System: 2 years

Table E-6

Rates of Return in Edge-Market
10,000 Subscriber Systems in Markets 51-100

	Copyright Fee Schedule			
	#1	#2	#3	#4
Subscriber Penetration at Maturity = 0.653				
Revenues per Subscriber = $67.92 per Year*	14.82%	14.39%	13.[illegible]%	13.09%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	19.79%	19.39%	18.99%	18.19%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	23.88%	23.47%	23.07%	22.26%
Subscriber Penetration at Maturity = 0.553				
Revenues per Subscriber = $67.92 per Year*	13.21%	12.81%	12.40%	11.56%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	18.29%	17.92%	17.55%	16.80%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	22.36%	21.99%	21.61%	20.87%

*with no growth over time

Other Variables:

Density: 125 homes/mile

Imported Signals: 2 independent, 1 educational

Microwave Hops: 15

Underground Cable: 5%

Investment Period for Distribution System: 2 years

Table E-7

Rates of Return in
10,000 Subscriber Systems in Markets 101+

	Copyright Fee Schedule			
	#1	#2	#3	#4
Middle-Market Systems				
Revenues per Subscriber = $67.92 per Year*	16.68%	16.22%	15.77%	14.86%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	21.49%	21.07%	20.64%	19.79%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	25.56%	25.13%	24.70%	23.83%
Edge-Market Systems				
Revenues per Subscriber = $67.92 per Year*	13.52%	13.11%	12.69%	11.84%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	18.62%	18.24%	17.86%	17.10%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	22.72%	22.34%	21.96%	21.19%

*with no growth over time

Other Variables:

Subscriber Penetration at Maturity: 0.653

Density: 125 homes/mile for middle-market systems, 100 homes/mile for edge-market systems

Imported Signals: 1 independent, 1 educational

Microwave Hops: 12

Underground Cable: 5%

Investment Period for Distribution System: 2 years

Finally, we might pose the question of ability to pay in a slightly different manner: What percentage of revenues could each system pay every year without allowing its rate of return to fall below 15 percent? The answers to this question appear in Tables E-8 through E-10.

Combining the NCTA's own predictions about subscriber penetration with a modest 2 percent growth rate leads to estimates of 13.45 to 25.13 percent of revenues realized as excess returns. An increase in revenue growth to 4 percent leads to estimates of 30.56 to 39.80 percent of revenues as excess returns. Even the more modest 55.3 percent penetration assumption for the top 100 markets yields estimates of 12.52 to 22.28 percent of revenues in excess of those required to cover the cost of capital with our modest 2 percent growth rate. This rises to 29.82 to 37.57 percent when 4 percent growth is assumed. Even if penetration is a meager 40 percent of homes passed at maturity, 4 percent revenue growth would yield estimates of excess returns of 17 to 30 percent of revenues for a 10,000 subscriber system.

Table E-8

Percentage of Revenues Available for Copyright Fees or Other Uses After Allowance for 15 Percent Cost of Capital

	10,000 Subscriber Systems in the Middle of the Top 50 Markets	
	Subscriber Penetration at Maturity = 65.3%	Subscriber Penetration at Maturity = 55.3%
Revenues per Subscriber = $67.92 per Year*	9.50%	6.01%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	25.13%	22.28%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	39.83%	37.57%
	10,000 Subscriber Systems in the Edge of the Top 50 Markets	
	Subscriber Penetration at Maturity = 65.3%	Subscriber Penetration at Maturity = 55.3%
Revenues per Subscriber = $67.92 per Year*	3.76%	0.00%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	20.44%	16.77%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	36.11%	33.20%

*no growth over time

Table E-9

Percentage of Revenues Available for Copyright Fees or Other Uses After Allowance for 15 Percent Cost of Capital

	10,000 Subscriber Systems in the Middle of Markets 51-100	
	Subscriber Penetration at Maturity = 65.3%	Subscriber Penetration at Maturity = 55.3%
Revenues per Subscriber = $67.92 per Year*	4.00%	0.00%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	20.63%	16.90%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	36.26%	33.30%
	10,000 Subscriber Systems in the Edge of Markets 51-100	
	Subscriber Penetration at Maturity = 65.3%	Subscriber Penetration at Maturity = 55.3%
Revenues per Subscriber = $67.92 per Year*	0.00%	0.00%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	16.91%	12.52%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	33.31%	29.82%

*no growth over time

Table E-10

Percentage of Revenues Available for Copyright Fees or Other Uses After Allowance for 15 Percent Cost of Capital

	10,000 Subscriber Systems in Markets 101+	
	Middle Subscriber Penetration at Maturity = 65.3%	Edge Subscriber Penetration at Maturity = 65.3%
Revenues per Subscriber = $67.92 per Year*	4.83%	0.00%
Revenues per Subscriber = $67.92 plus 2% Growth per Year	21.31%	13.45%
Revenues per Subscriber = $67.92 plus 4% Growth per Year	36.80%	30.56%

*no growth over time

F. CONCLUSIONS

Based on the foregoing calculations, our conclusions on the ability of cable systems to develop in major markets and to pay prospective copyright fees is much more sanguine than that offered by Mitchell. The difference derives largely from the unsupportable assumptions made by Mitchell in his analysis--assumptions wholly inconsistent with NCTA members' predictions and recent behavior in cable system sales. Once Mitchell's low penetration rates and conservative revenue estimates are replaced by more reasonable industry estimates, rates of return rise strikingly, even in the face of rather substantial copyright fee payments.

Despite our rather substantial revision of Mitchell's calculations, our estimates of prospective system profitability remain quite conservative for six major reasons.

First, we use Comanor-Mitchell's capital and operating cost data with very little alteration. These estimates have been criticized as considerably high and will probably prove to overestimate cable system costs in future years.

Second, we utilize Mitchell's arbitrary maturity path in our calculations. As cable is built in larger, denser markets, it may be easier for cable operators to enroll subscribers at a more rapid pace.

Third, we assume that no installation fees are collected by system owners despite obvious evidence to the contrary.

Fourth, we assume that every system invests in its own origination equipment. For smaller systems, this may well be a generous assumption if methods are devised to share origination facilities.

Finally, the large microwave costs are arbitrary at best. With the development of new competition in microwave common carriage, and the possibility of satellite distribution systems, it seems likely such costs for each system to build and maintain its own microwave equipment will decline substantially.

Our assumption of future mature penetration levels is more generous than that provided by existing statistical demand models, but these models are seriously deficient in their ability to predict even current demand. Since our projections of penetration derive from estimates offered by major cable companies, we believe that they are more soundly based than the relatively pessimistic values advanced by Mitchell.

The resulting estimates of cable profitability find medium to large size systems earning in excess of 20 percent on capital in nearly every situation in the absence of copyright payments. These returns are above those deemed necessary to attract investment capital to the industry. Thus, we conclude that substantial copyright fees could be paid without inhibiting the growth of typical cable systems in the country's major markets as they are presently conceived.

Mr. Brennan. Mr. Chairman, the next witnesses appear on behalf of the National Association of Broadcasters and the Association of Maximum Service Telecasters.

This will be a joint presentation on behalf of both broadcasting associations.

Mr. Wasilewski, would you identify yourself and your associates, please?

STATEMENT OF VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS; ACCOMPANIED BY: JOHN B. SUMMERS, GENERAL COUNSEL, ERNEST W. JENNES, ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.

Mr. Wasilewski. Mr. Chairman, I appear here both in my capacity as president of the National Association of Broadcasters and also on behalf of the Association of Maximum Service Telecasters. With me today are John Summers, NAB's general counsel and Ernest Jennes, MST's general counsel.

NAB and MST are making a joint presentation because of the very limited amount of time allocated to broadcasters. There is no difference in the positions on CATV copyright.

Now, broadcasters have at least two different interests in CATV copyright. First, broadcasters themselves have ownership interests in some copyrighted material that CATV systems continue to take from broadcast stations without payment and sell to the public for a fee.

Second, CATV systems are in direct competition with broadcast stations for viewers, listeners, and advertising revenue. This competition is increasing and will continue to increase. Indeed, leading CATV spokesmen state repeatedly that they hope and intend that cable television will largely, if not entirely, replace free broadcast television.

A law that confers a compulsory copyright license on cable television inherently gives CATV an unfair competitive advantage over free broadcasters, who must bargain for copyrighted material they use. CATV would have this unfair advantage even if it had to pay as much as broadcasters for copyrighted material. In fact, it is clear that CATV would pay much less for the same material, not only under the low CATV fee levels proposed in S. 1361 but even under the levels supported by the copyright owners. For example, FCC figures show that the typical television station pays 34 percent of its total revenue for its nonnetwork program material.

Despite the inherent unfairness, NAB and MST have been willing to support limited compulsory licenses in accordance with the terms of the November 1971 consensus agreement, which was also accepted by NCTA and the copyright owners.

We believe that, as provided in that consensus, the fee levels for such compulsory licenses should be determined by an independent arbitration tribunal, and not by statutory fiat. Such a tribunal would have both the time and the expertise to sort out the conflicting claims of the interested parties and the complex and elaborate economic data advanced in support of those claims.

Traditionally, Congress delegates such complex questions to a body equipped to examine them in detail. If the claims of the CATV industry to a very minimal fee are valid, the industry should not be afraid to submit them to an arbitration tribunal. Moreover, NCTA specifically agreed that the fees would be fixed by arbitration as part of the consensus agreement.

As a result of that consensus, the cable industry has been enjoying the benefit of permissive new FCC rules on the importation of distant broadcast stations for over a year and a half. It ill-behooves NCTA to back away from the consensus now.

NAB and MST reluctantly accepted that consensus and agreed to support a limited compulsory license for CATV only because of our belief that the consensus limitations on the scope of the compulsory license would be implemented. Provided that those limitations are implemented, we continue to support the consensus despite the recent decision of the second circuit holding that all CATV use of distant signals is subject to normal copyright liability.

Without such limitations, the unfair subsidy which compulsory licenses exact from broadcasters would undermine the economic viability of free television broadcasting, thus depriving the public of free programing they now receive and impairing the principal source of the revenues to program producers necessary to stimulate program creation and development.

Specifically, NAB and MST submit that compulsory licenses for CATV systems should cover only CATV retransmission of local broadcast stations and such programs from distant stations as are contemplated under the FCC's 1972 CATV rules.

An openended compulsory license—one for example that covered all CATV retransmission of distant stations which the FCC may hereafter authorize—would be a sweeping delegation to four or fewer members of the FCC to change and even radically revise the copyright law at any time in the future.

We strongly oppose any such openended compulsory license. We assume, in view of the letter of January 31, 1972, from the chairman of this subcommittee to Chairman Burch and the fact that the current hearings are not focusing specifically on the critical question of the terms and conditions of the compulsory license, that this subcommittee does not have doubts about the approach agreed to by NCTA, the copyright owners, NAB, and MST when they accepted the 1971 consensus.

If there are doubts, we urge that such hearings be held. In any event, because the question of the scope of the compulsory license is of paramount importance, we plan to submit a supplemental written statement on that subject, together with suggested statutory language.

Although broadcasters have not been invited to participate in the hearings this afternoon on copyright treatment of sports events, broadcasters fully support normal copyright liability for cable retransmission of sports events not available to a local station as proposed in S. 1361. We also plan to submit a supplementary statement which will deal with this vital question.

Let me close, Mr. Chairman, by saying on behalf of NAB that, while the record is not being opened with respect to section 114 of S. 1361, NAB and broadcasters generally are steadfastly opposed to the creation of a new proprietary right in the form of copyright recording right for record manufacturers and performers.

Thank you vey much for inviting me to appear today.

Senator McClellan. Very well.

Any questions, Senator?

Senator Burdick. Well, the sense of your testimony, or the essence of it, is, you are willing today, to abide by the consensus agreement.

Mr. Wasilewski. Yes, sir. On an all together basis.

Senator Burdick. That seems to be the essence on your testimony. I have no further questions.

Mr. Wasilewski. Yes, sir. That is.

Mr. Brennan. Mr. Wasilewski, could you indicate whether or not you support the position taken by the subcommittee previously on the sport provision of section 111?

Mr. Wasilewski. As contained in the present bill?

Mr. Brennan. As contained in the present bill.

Mr. Wasilewski. Yes, sir. I did say that we support that position.

Senator McClellan. You indicate that you had not been invited. I wonder if you felt that you should participate?

Mr. Wasilewski. I just wanted to point out, sir, that I was testifying on behalf of something that was not part of this morning's hearing, and we do not necessarily want to come in this afternoon. We would like the opportunity to rebut.

Senator McClellan. If you wanted to appear, I was going to consider your interest and give you the opportunity. That was all I wanted to be sure of.

Mr. Wasilewski. I said all that I wanted to say about it.

Senator McClellan. All right.

Thank you very much.

Call the next witness.

Mr. Wasilewski. Thank you.

[The prepared statement of Mr. Vincent T. Wasilewski follows:]

JOINT STATEMENT ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS AND THE ASSOCIATION OF MAXIMUM SERVICE TELECASTERS BY VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS, BEFORE THE SUBCOMMITTEE ON COPYRIGHTS, PATENTS, AND TRADEMARKS, SENATE COMMITTEE ON THE JUDICIARY

Mr. Chairman, I appear here both in my capacity as President of the National Association of Broadcasters and also on behalf of the Association of Maximum Service Telecasters. With me today are John Summers, NAB's General Counsel, and Ernest Jennes, MST's General Counsel. NAB and MST are making a joint presentation because of the very limited amount of time allocated to broadcasters. There is no difference in their positions on CATV copyright.

Broadcasters have at least two different interests in CATV copyright. First, broadcasters themselves have ownership interests in some copyrighted material that CATV systems continue to take from broadcast stations without payment and sell to the public for a fee. Second, CATV systems are in direct competition with broadcast stations for viewers, listeners and advertising revenue. This competition is increasing and will continue to increase. Indeed, leading CATV spokesmen state repeatedly that they hope and intend that cable television will largely, if not entirely, replace free broadcast television.

A law that confers a compulsory copyright license on cable television inherently gives CATV an unfair competitive advantage over free broadcasters, who must bargain for copyrighted material they use. CATV would have this unfair advantage even if it had to pay as much as broadcasters for copyrighted material. In fact, it is clear that CATV would pay much less for the same material, not only under the low CATV fee levels proposed in S. 1361 but even under the levels supported by the copyright owners. For example, FCC figures show that the typical television station pays 34 percent of its total revenue for its non-network program material.

Despite the inherent unfairness, NAB and MST have been willing to support *limited* compulsory licenses in accordance with the terms of the November 1971 "Consensus Agreement" which was also accepted by NCTA and the copyright owners. We believe that, as provided in that Consensus, the fee levels for such compulsory licenses should be determined by an independent arbitration tribunal, and not by statutory fiat. Such a tribunal would have both the time and the expertise to sort out the conflicting claims of the interested parties and the complex and elaborate economic data advanced in support of these claims. Traditionally Congress delegates such complex questions to a body equipped to examine them in detail. If the claims of the CATV industry to a very minimal fee are valid, the industry should not be afraid to submit them to an arbitration tribunal. Moreover, NCTA specifically agreed that the fees would be fixed by arbitration as part of the "Consensus Agreement." As a result of that Consensus, the cable industry has been enjoying the benefit of permissive new FCC rules on the importation of distant broadcast stations for over a year and a half. It ill behooves NCTA to back away from the Consensus now.

NAB and MST reluctantly accepted that Consensus and agreed to support a *limited* compulsory license for CATV only because of our belief that the Consensus limitations on the scope of the compulsory license would be implemented. Provided that those limitations are implemented, we continue to support the Consensus despite the recent decision of the Second Circuit holding that *all* CATV use of distant signals is subject to normal copyright liability. Without such limitations, the unfair subsidy which compulsory licenses exact from broadcasters would undermine the economic viability of free television broadcasting, thus depriving the public of free programming they now receive and impairing the principal source of the revenues to program producers necessary to stimulate program creation and development.

Specifically, NAB and MST submit that compulsory licenses for CATV systems should cover only CATV retransmission of local broadcast stations and such programs from distant stations as are contemplated under the FCC's 1972 CATV rules. An open-ended compulsory license—one for example that covered all CATV retransmission of distant stations which the FCC may hereafter authorize—would be a sweeping delegation to four or fewer members of the FCC to change and even radically revise the copyright law at any time in the future. We strongly oppose any such open-ended compulsory license. We assume, in view of the letter of January 31, 1972, from the Chairman of this Subcommittee to Chairman Burch and the fact that the current hearings are not focusing specifically on the critical question of the terms and conditions of the compulsory license, that this Subcommittee does not have doubts about the approach agreed to by NCTA, the copyright owners, NAB, and MST when they accepted the 1971 Consensus. If there are doubts we urge that such hearings be held. In any event, because the question of the scope of the compulsory license is of paramount importance, we plan to submit a supplemental written statement on that subject, together with suggested statutory language.

Although broadcasters have not been invited to participate in the hearings this afternoon on copyright treatment of sports events, broadcasters fully support normal copyright liability for cable retransmission of sports events not available to a local station as proposed in S. 1361. We also plan to submit a supplementary statement which will deal with this vital question.

Let me close by saying on behalf of NAB that, while the record is not being opened with respect to Section 114 of S. 1361, NAB and broadcasters generally are steadfastly opposed to the creation of a new proprietary right in the form of a copyright recording right for record manufacturers and performers.

Thank you very much for inviting me to appear today.

Mr. BRENNAN. We now have a joint presentation by the three performing rights societies, ASCAP, BMI, and SESAC.

Mr. Herman Finkelstein, would you make your presentation? Could you identify——

Mr. CRAMER. Mr. Counsel, Mr. Chairman, my name is Edward M. Cramer. I am president and chief executive officer, of Broadcast Music, Inc. Seated on my far left is Albert F. Ciancimino, counsel for SESAC, Inc., and to my immediate left is Herman Finkelstein, general counsel for ASCAP. In order to conserve the time of this committee, we have agreed upon a joint presentation, where all of us will be available subsequent to the presentation to answer your questions.

Thank you.

Mr. BRENNAN. Counsel thanks all three societies for their cooperation and hopes it will continue.

Senator McCLELLAN. Have you submitted your statement?

Mr. CRAMER. Yes.

Mr. BRENNAN. Yes, Mr. Chairman.

Senator McCLELLAN. They will be printed in the record in full. You may proceed.

STATEMENT OF HERMAN FINKELSTEIN, GENERAL COUNSEL, ASCAP; ACCOMPANIED BY: EDWARD M. CRAMER, PRESIDENT, BMI; ALBERT F. CIANCIMINO, COUNSEL, SESAC, INC.

Mr. FINKELSTEIN. Mr. Chairman, in accordance with the committee's request, this statement, as Mr. Cramer pointed out, is being presented jointly on behalf of the three American organizations which make it possible for all users of musical works, including operators of cable televisions systems to obtain licenses to perform publicly in nondramatic form, any musical composition required in their operations.

These organizations, the Ameriaen Society of Composers, Authors, and Publishers, commonly known as ASCAP; Broadcast Music, Inc., commonly known as BMI; and SESAC, Inc. are well known to the Chairman and members of this committee. Each is filing a separate statement, but all three join in this statement, following the suggestion of counsel for this committee.

We shall briefly summarize the reasons supporting our position that there is no need for a statutory license for the music embodied in these three repertories because there is already adequate assurance of the availability of all music they require at fair and nondiscriminatory prices; and that if any price control is necessary, it is already available by resort to an impartial body—the courts or arbitration.

As our respective supporting statements indicate:

(1) Music performed in nondramatic form is unique among copyrighted works in that it is all available to everyone, including CATV, on a nonexclusive basis without any problems of clearance or complicated negotiations for individual works, or fears of prices being arbitrary, unreasonable or discriminatory.

(2) Music has been available to all users through this simple method of licensing for decades.

(3) The assurance that prices will be fair, reasonable, and nondiscriminatory is a matter of public record. In the case of ASCAP, it is embodied in a decree of the Federal Court entered in 1950 on the consent of the U.S. Government and ASCAP.

The Federal Court is available to any user, including CATV, who questions the reasonableness of rates quoted by ASCAP. Several proceedings to determine reasonable rates have been brought by broadcasters, wired music operations and others. In fact, proceedings to determine reasonable rates brought by the national broadcasting networks and by Muzak operators and others are pending at this time.

BMI and SESAC, Inc. have tendered arbitration to the CATV representatives and will continue to do so.

(4) The distance of the station from which music is picked up does not raise any problems. Under the prevailing licensing system, all music is equally available to CATV whether it comes from distant sources, from local sources, or even when it is originated by the cable system itself.

5. We have heard a great deal about the keeping of records of uses and seeing that payments are apportioned among those whose works are used. This is undertaken by the licensing organizations; it does not present a problem to the CATV operator.

6. The music licensing organizations have met with representatives of the cable television industry and have not had any problem as to the method of licensing and the availability of all music used in nondramatic form to all CATV operators for all purposes.

Figures requested by cable television to assist in reaching agreement as to rates for all their music were given to CATV by these organizations several months ago. There is every reason to believe that agreement can be reached with the CATV industry, as it has been with other industries, considering all the safeguards available to CATV.

In conclusion, we submit that there is no necessity for a compulsory license for musical works if those works are available on the following basis:

First, the works are part of a total repertory made available to cable television under a single license agreement without requirement of separate negotiations for individual works or individual uses;

Second, the works are available on a nonexclusive basis on fair and nondiscriminatory terms.

Third, the agreement makes the works available for a substantial period of time. Agreements are made available to broadcasters for a period of 5 years.

Fourth, in the event of dispute as to the reasonableness of the rates quoted, the rates can be determined by resort to a U.S. district court or to arbitration.

Fifth, provision is made for payment to the licensor for distribution to the parties entitled to the amounts collected so as to avoid any disputes between the licensees—that is, individual cable systems—and individual copyright owners.

As we have previously indicated, section 111 could be framed so as to exempt musical works from a compulsory license if they are voluntarily made available on the basis I have outlined; or it could specifically require that all musical works be licensed to cable television for retransmission on that basis.

If a work does not meet those requirements, it could, of course, be made subject to a compulsory license on the same basis as other material.

In sum, the music licensing organizations have tendered licenses that meet all problems of the cable television industry. These problems have been solved by a system that insures a maximum of availability and a minimum of accounting and negotiation. Equal treatment of all is assured without preference to anyone.

The only item for discussion is price, and if that cannot be agreed on, there is an impartial outside body—a court or arbitration—available to insure reasonableness.

We respectfully submit that when copyright owners make their works available to all users on a basis that insures reasonableness, there is no need for a statutory licensing system—a regulatory device that should be resorted to only when voluntary action fails to meet a public need.

Thank you, Mr. Chairman.

If there are any questions, any of us will be happy to answer them.

Senator McCLELLAN. Thank you very much.

Senator Burdick, do you have any questions?

Senator BURDICK. On page 2 you refer to the court action in 1950, and then you state, "The Federal court is available to any user who questions the reasonableness of rates quoted by ASCAP including CATV." This is a legal question.

What is your basis for appealing to the courts at that point?

Mr. FINKELSTEIN. Oh, when you have organizations that have as many copyright owners as ASCAP has, you are going to have problems under the antitrust laws. And we each have worked out agreements with the U.S. Government that we commonly refer to as consent decrees, under which we make the repertory available on a basis agreed to by the U.S. Government and the society.

One of the provisions of that decree of 1950 is that any user who is dissatisfied with the rate quoted by ASCAP may, at the election of the user, go to the Federal court and have the reasonableness of the rate determined and have the court fix a reasonable rate.

Senator BURDICK. I am trying to get the legal basis. I cannot go to court on any other commercial transaction to say it is unreasonable or reasonable.

What is the basis of getting jurisdiction?

Mr. FINKELSTEIN. Of course, copyright gives the exclusive right, but when you combine copyrights, you become subject to another law, the antitrust laws. And the courts, under the antitrust laws, may require that the copyright owners agree that their rate shall be fixed by the court in the event of disagreement.

In the case of music, collective action makes it possible to avoid all these difficulties that you have had with the other industries; but in doing that, you collide with the antitrust laws and must make some arrangement where the public can be sure that the prices quoted by this combination are reasonable.

Senator BURDICK. In other words, then, there is no question in your mind that there could be court review?

Mr. FINKELSTEIN. None whatsoever.

Mr. CIANCIMINO. Senator, I would like to make one thing clear. Mr. Finkelstein did say that we are each subject to consent decrees. However, SESAC is not subject to a consent decree. We are a small operation, and in lieu of the Federal court's availability, we have offered arbitration to the cable television operators in order to set a reasonable fee.

Senator BURDICK. Well, eventually if everything else fails, there is access to the courts even in your cases.

Mr. CIANCIMINO. I suppose there would be if an action were brought and the court does determine that we should come under the same type of supervision as ASCAP.

Senator BURDICK. That is all.

Senator McCLELLAN. Thank you very much.

[The statements referred to earlier follow:]

STATEMENT OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS (ASCAP), BROADCAST MUSIC, INC. (BMI), AND SESAC, INC. (SESAC) BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SENATE JUDICIARY COMMITTEE ON S. 1361

(August 1, 1973)

Mr. Chairman, in accordance with the Committee's request, this statement is being submitted jointly on behalf of the three American organizations which make it possible for all users of musical works, including operators of cable television systems (CATV) to obtain licenses to perform publicly in nondramatic form, any musical composition required in their operations. These organizations—the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc. are well known to the Chairman and members of this Committee. Each is filing a separate statement, but all three join in this statement, following the suggestion of Counsel for this Committee, who has been most cooperative.

We shall briefly summarize the reasons supporting our position that there is no need for a statutory license for the music embodied in these three repertories because there is already adequate assurance of the availability of all music they require at fair and nondiscriminatory prices; and that if any price control is necessary it should be determined by an impartial body—the courts or arbitration. As our respective supporting statements indicate:

1. Music performed in nondramatic form is unique among copyrighted works in that it is all available to everyone including CATV on a nonexclusive basis without any problems of clearance or complicated negotiations for individual works, or fears of prices being arbitrary, unreasonable or discriminatory.

2. Music has been available to all users through this simple method of licensing for decades.

3. The assurance that prices will be fair, reasonable and nondiscriminatory is a matter of public record. In the case of ASCAP, it is embodied in a decree of the Federal Court entered in 1950 on the consent of the United States Government and ASCAP. The Federal Court is available to any user who questions the reasonableness of rates quoted by ASCAP (including CATV). Several proceedings to determine reasonable rates have been brought by broadcasters, wired music operators and others. In fact proceedings to determine reasonable rates brought by the national broadcasting networks and by Muzak operators and others are pending at this time.

BMI and SESAC, Inc. have tendered arbitration to the CATV representatives and will continue to do so.

4. The distance of the station from which *music* is picked up does not raise any problems. Under the prevailing licensing system, all music is equally available to CATV whether it comes from distant sources, from local sources, or even when it is originated by the cable system itself.

5. The task of keeping records of uses and seeing that payments are apportioned among those whose works are used is undertaken by the licensing organizations; it does not present a problem to the CATV operator.

6. The music licensing organizations have met with representatives of the cable television industry and have not had any problem as to the method of licensing and the availability of all music used in nondramatic form to all CATV operators for all purposes. Figures requested by CATV to assist in reaching agreement as to rates for all their music were given to CATV by these organizations several months ago. There is every reason to believe that agreement can be reached with the CATV industry as it has been with other industries, considering all the safeguards available to CATV.

In conclusion, we urge that there is no necessity for a compulsory license for musical works if those works are available on the following basis:

(1) The works are part of a total repertory made available to cable television under a single agreement without the requirement of separate negotiations for individual works or individual uses;

(2) The works are available on a nonexclusive basis on fair and nondiscriminatory terms;

(3) The agreement makes the works available for a substantial period of time;

(4) In the event of dispute as to the reasonableness of the rates quoted, the rates can be determined by resort to a United States District Court or to arbitration.

(5) Provision is made for payment to the licensor for distribution to the parties entitled to the amounts collected so as to avoid any disputes between the licensee and individual copyright owners.

As we have previously indicated, Section 111 could be framed so as to exempt musical works from a compulsory license if they are voluntarily made available on the foregoing basis; or it could specifically require that all musical works be licensed to CATV for retransmission on the foregoing basis. If a work does not meet these requirements, it could, of course, be made subject to a compulsory license on the same basis as other material.

In sum, the music licensing organizations have tendered licenses that meet all problems of the CATV industry. These problems have been solved by a system that insures a maximum of availability and a minimum of accounting and negotiation. Equal treatment of all is assured without preference to anyone. The only item for discussion is price, and if that cannot be agreed on there is an impartial outside body—a court or arbitration—available to insure reasonableness.

It is respectfully submitted that when copyright owners make their works available to all users on a basis that insures reasonableness, there is no need for a statutory licensing system—a regulatory device that should be resorted to only when voluntary action fails to meet a public need.

Respectfully submitted.

SESAC, Inc.,
Albert F. Ciancimino,
General Counsel.
Broadcast Music, Inc.,
Edward M. Cramer,
President.
American Society of Composers,
Authors and Publishers,
Herman Finkelstein,
General Counsel.

American Society of Composers, Authors and Publishers,
New York, N.Y., July 26, 1973.

Hon. John L. McClellan,
Chairman, Subcommittee on Patents, Trade-Marks, and Copyrights, Committee on the Judiciary, Washington, D.C.

Dear Mr. Chairman: As suggested by your Committee, a joint statement is being made on behalf of all three music licensing organizations—the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. and SESAC, Inc. with respect to the method of licensing music to cable television.

ASCAP has already furnished this Committee with a statement of its position in a letter dated January 14, 1972 (replying to a letter from Mr. Thomas C. Brennan, Counsel for the Committee) and in an accompanying statement. Copies of that letter and statement are annexed and we respectfully request that they be made a part of the record of this hearing. What we said there with respect to S. 644 is of equal application to S. 1361.

The members of the American Society of Composers, Authors and Publishers appreciate the opportunity to present their views on cable television to this Committee.

Sincerely,

Herman Finkelstein,
General Counsel.

Enclosures.

American Society of Composers, Authors and Publishers,
New York, N.Y., January 14, 1972.

Thomas C. Brennan, Esq.
Chief Counsel, Senate Subcommittee on Patents, Trade-Marks, and Copyrights, Washington, D.C.

Dear Mr. Brennan: I am pleased to enclose the comments of the American Society of Composers, Authors and Publishers concerning the content of a modified Section 111 of S. 644 which you invited by your letter of December 15, 1971. We appreciate particularly having this opportunity to explain why music requires separate treatment in the cable section of the copyright bill, and have devoted our comments principally to this area.

As the cable television industry has recognized from the very outset music does not present the licensing problems that exist with respect to other forms of copyright material. Music does not pose questions of exclusive rights, nor are music interests desirous of limiting the importation of remote signals or of giving anyone an advantage over any competitor. Unlike other works, music is licensed in bulk; there are no problems of innumerable negotiations for separate licenses for each work or each use. Even the problem of price is solved by the opportunity, if there are any disputes as to rates, to resort to a Federal Court as in the case of ASCAP, or to arbitration in the case of the other licensing organizations.

We urge that there is no necessity for a compulsory license for musical works if those works are available on the following basis:

(1) The works are part of a total repertory made available to cable television under a single agreement without the requirement of separate negotiations for individual works or individual uses;

(2) The works are available on a non-exclusive basis on fair and non-discriminatory terms;

(3) The agreement makes the works available for a substantial period of time;

(4) In the event of dispute as to the reasonableness of the rates quoted, the rates can be determined by resort to a United States District Court or to arbitration.

(5) Provision is made for payment to the licensor for distribution to the parties entitled to the amounts collected so as to avoid any disputes between the licensee and individual copyright owners.

To the extent that these provisions are met by an organization licensing musical works to cable television, the reasons for statutory regulation disappear.

Section 111 could be framed so as to exempt musical works from a compulsory license if they are voluntarily made available on the foregoing basis; or it could specifically require that all musical works be licensed to CATV for retransmission on the foregoing basis. If a work does not meet these requirements, it could, of course, be made subject to a compulsory license on the same basis as other material.

In its comments, ASCAP has also addressed briefly the other questions raised by your letter of December 15. In sum, we feel that for copyrighted material which is subject to statutory licensing, a formula based on the gross receipts from all sources would be best. And we believe that small systems should pay copyright fees. These systems are operated for profit, and they should pay some kind of fee, although, as is usual, the rates charged would take into account their economic position.

For many years now the three music licensing organizations have stood ready to license the cable television industry. There is no dispute between the parties, and the cable industry has long recognized its obligation to pay royalties for the use of music. The parties should now be given a green light to seek voluntary agreement.

Sincerely yours,

HERMAN FINKELSTEIN.

STATEMENT OF HERMAN FINKELSTEIN, GENERAL COUNSEL, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS TO THE U.S. SENATE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

(January 14, 1972)

By letter of December 15, 1971, Thomas C. Brennan, Chief Counsel of the Senate Subcommittee on Patents, Trade-Marks, and Copyrights, invited the American Society of Composers, Authors and Publishers (ASCAP) to submit its comments on the forthcoming modification of Section 111 of S. 644, a bill for the general revision of the copyright laws. The letter, after pointing out that the Subcommittee "has already made certain determinations concerning the basic nature of the cable television copyright provision," requests comment on (1) the basis to be used in determining royalty rates; (2) the desirability of exemption on the basis of size; and (3) "whether any particular type of program material, such as music or professional and collegiate sports, requires separate treatment in the cable section of the copyright bill."

These comments on behalf of the 13,000 writer members and 4,000 publisher members of ASCAP will be devoted primarily to showing why music requires separate treatment.

Whereas other material used by CATV involves complicated problems of importation of distant signals, the protection of exclusive grants of rights, and the possibility of unfair competition between competing media—situations that required meetings among the CATV, broadcasting and motion picture interests to arrive at a compromise—music presents no such problems. In fact, no one representing musical interests was invited to attend those meetings although I made it clear to the parties on many occasions that I was prepared to attend if invited. The reason why music has not been a problem to CATV is that long before CATV came on the scene, the men and women who founded ASCAP in 1914 had devised a system for licensing the performance of musical works on a basis that insured complete access by all media on a non-exclusive basis without the necessity of separate negotiations for individual uses, and without any complicated records or accounting of uses. There is complete assurance in advance that the user will have access to all musical works from any source; there is an assurance that the amount paid will be distributed to the persons entitled to those sums; and there is an assurance that the price charged will be reasonable. In the case of ASCAP, as will be shown, any user, including CATV, may apply to the federal court for determination of a fair rate if the parties cannot agree.

Before commenting on the specific issues raised by Mr. Brennan's letter, I would like to describe ASCAP and the role it plays in the licensing of musical compositions in the United States.

Under the ASCAP system, a single agreement licenses the non-dramatic performance of all the musical works in its repertory. Such licenses have been issued by ASCAP for many years to virtually all radio and television stations in the United States to perform any or all of its members' works.

In licensing the performance of musical works, it is customary to base the charge for a particular commercial user on the value of the music to that user in relation to the amount paid by the public to that user. Where several users benefit from a single performance, each pays in proportion to its receipts. For example, in a professional football game, music performed during half-time is viewed and heard by those in the stadium. At the same time, it may be carried by local radio and television stations in the city of one or both of the participating teams, and may even be broadcast on a national television network. It may also be retransmitted by one or more cable systems. At the present time, the professional football organization pays for the music used in entertaining the fans in the stadium during half-time; and the local stations, however small, and the national television network pay on the basis of the music's value to them in attracting audiences for their respective advertisers. The cable systems should pay on the basis of the value of the music to the particular CATV system. This will be discussed in more detail later.

Unlike other copyrighted material for which separate negotiations are necessary, in the case of music the rates paid by the broadcasting industry are reached by negotiation of a single agreement between ASCAP and an association representing the industry or the entity or entities seeking its license. There is also a mechanism to ensure that ASCAP's rates are fair and reasonable. In 1950, ASCAP agreed that the public interest would be served by having a neutral body available to determine the reasonableness of ASCAP's rates for the use of its music. That policy was embodied in a Consent Decree entered into between the United States Government and ASCAP, providing that any user who questioned the reasonableness of ASCAP's rates could have the rates reviewed by a United States Court. Since then, the broadcasting industry has resorted to the Court on many occasions; and proceedings are, in fact, now pending between television networks and ASCAP and between wired music services and ASCAP to determine what is a reasonable rate. If in the future ASCAP and the cable television industry are unable to agree on reasonable rates, the industry can, like all other users, bring the dispute to the Court for its determination.

There are two other organizations in the United States for the licensing of non-dramatic performances of music. One is Broadcast Music, Inc. (BMI), which offers to submit any question of reasonableness to arbitration. The third and smallest organization is SESAC, Inc., which is also willing to submit the reasonableness of its rates to arbitration. Thus, all the music used on radio and television is covered by the licenses of only three organizations. The same ease of licensing is now available to CATV.

ASCAP also provides a mechanism for the fair distribution among its members of the copyright royalties it collects. For most active music writers, their share in these royalties is their basic livelihood. The essential rules governing ASCAP's distribution process are prescribed by the Consent Decree entered into by the United States Government and ASCAP. Both BMI and SESAC also have distribution mechanisms.

None of the problems that S. 644's system of statutory licensing is designed to meet is present in the case of music. First, there is complete access to music by any cable system regardless of who else may be licensed in the same area. Compare music with motion pictures or other types of copyrighted material licensed on an individual basis. Unlike music, the latter material is licensed on an exclusive basis in a particular area. It will presumably be licensed to the highest bidder. If it is licensed to a particular television station in a market, it is not licensed to another station or to a cable system for origination at least for many years. Conversely, if it is licensed to a cable system, it will not be made available to a television station in the same market for many years. No one can perform a motion picture unless she has secured the original film from the producer or has access to a television broadcast. Musical compositions, on the other hand, are equally and immediately available to all television and radio stations and all cable systems. Recordings and sheet music may be bought in the open market by any station or CATV operator. One cannot preempt another's use of music; nor may one would-be user of music be bargained off against another to see which will pay the higher price.

Second, there is no problem of clearance. ASCAP receives from its members the authority to grant, on a non-exclusive basis, the right to perform their works publicly for profit in non-dramatic form. Once a cable system has an ASCAP license to retransmit ASCAP's music, it has full clearance to do so.

Third, there need be no fear that cable systems will have to pay an excessive amount to ASCAP for its license. As I have described, ASCAP has a system for licensing music that provides all who seek a license an opportunity to secure a judicial determination of the reasonableness of the proferred rate. This system has been in existence for more than twenty years and has proven its worth.

Fourth, there is no need to establish a statutory mechanism for the distribution of the royalties collected by ASCAP. It already has a sound and effective mechanism, one that is now embodied in a Consent Decree.

Music of the other two organizations is available on substantially the same basis.

There is no necessity for a statutory system of licensing music which is made available to cable systems under the foregoing conditions. A system of voluntary agreement is preferable to a statutory system if the necessary safeguards are present. It permits the parties in seeking agreement to take into account the conditions existing at the time of negotiation and the peculiar facts that apply to the particular works and uses which are then under consideration. A statutory rate, in contrast, can at best reflect only the conditions existing at the time the statute was enacted; it cannot take into consideration the unique factors applicable to the works involved—that is, their general availability to cable, the basis on which they are made available to television stations and networks, and the many other factors that influence terms and price. These conditions can vary from time to time and in innumerable ways. With judicial determination or arbitration to resolve disputes as to price, there is full assurance that a party cannot misuse negotiations to refrain from agreement and that a fee or schedule of fees will ultimately be fixed.

The cable people recognize that there is no problem with music for which a statutory method of licensing is necessary.

ASCAP has offered to grant the industry a license to use its repertory without restriction as to the source of performance—that is, whether performances are originated by distant radio and television stations, are originated by local radio and television stations, are recorded on commercial phonograph records or motion pictures, or are originated by the cable television operator. There is no dispute between ASCAP and the cable industry with regard to access to its repertory and the opportunity to retransmit on cable any musical work in that repertory. Cable television operators have conceded that they should pay for the retransmission of copyrighted musical works, and ASCAP concedes that they should have an unlimited right to make such retransmissions.

Thus far we have been discussing television and CATV. There is another aspect of CATV which does not relate to other program material (such as motion pictures) and deals almost entirely with music. I refer to the retransmission of radio signals. The primary fare of radio, as I have indicated, is music, and most of it is performed by the playing of phonograph records. A cable operator may provide a music channel by playing phonograph records, much as a radio station does. If he does so, he will be acting as an originator and would require an ASCAP license in any event. A cable operator who instead establishes music channels by retransmitting radio stations that carry the kind of music he wants for his channels should not be permitted thereby to escape the same obligation to pay the same fair share of the amounts paid by the public for the enjoyment of copyrighted music that would be paid by the radio broadcaster.

In choosing the radio station to be picked up, CATV will select the stations playing the best music and having the smallest number of interruptions for commercial messages, if any. Unlike motion pictures, the smallest station can afford to play the best music. It is all available to it. If payment by CATV is not related to all sums received by the public, the author of the works used will be denied a fair return for his work.

We turn now to the question of "whether royalty rates should be determined by a single graduated formula of a percentage of the gross receipts paid by subscribers for the basic service of providing secondary transmissions, or whether the formula should provide a basic rate for carriage of local signals, with an additional charge related to the number of distant signals carried by a particular system." To the extent that certain material may require compulsory licensing, the best formula would be one that provides for payment of a percentage of the gross receipts *from all sources*. ASCAP is mindful that a number of significant studies (for example, the report released in December, 1971 by the Sloan Commission on Cable Communications) have predicted that by the end of the 1970's, between 40 and 60 percent of the nation's television viewing population will be on the cable. If this is so, cable may acquire an importance now undreamed of, and sources of income attributable to the copyrighted material supplied by broadcasting which may be far greater than amounts received from subscribers.

We turn now to the question of whether "it is desirable to exempt a commercial enterprise from the payment of copyright fees exclusively on the basis of size".

The November, 1971 "compromise" reached by the broadcasting industry, the cable industry, and certain copyright owners (as set forth in Broadcasting Magazine, November 8, 1971, pages 16–17) states that the parties support legislation that establishes "liability to copyright, including the obligation to respect valid exclusivity agreements. . . . for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3,500 subscribers". Incidentally ASCAP first learned of this compromise from the trade press.

ASCAP feels that independently owned cable systems with less than 3,500 subscribers do not require an exemption. Small cable systems like large ones should pay reasonable fees for the use of copyrighted material. The rates will, of course, take their respective economic positions into consideration. There are many such systems in the United States today. They serve an important function by making a full complement of television signals available to rural areas and to small towns that are poorly served by over-the-air television. But these small systems are also commercial enterprises that operate at a profit, and there is no warrant for asking in effect that copyright owners subsidize them. Small radio and television stations pay for the use of music. Music enhances the value of cable to subscribers, and all cable systems should pay a ratable portion of their receipts for the use of copyrighted music. If the rates are reasonable and all systems are treated in a non-discriminatory way, there can be no unfairness.

STATEMENT OF BROADCAST MUSIC, INC. (BMI) BEFORE THE SENATE JUDICIARY COMMITTEE ON S. 1361

(August 1, 1973)

BMI welcomes this opportunity to express its views concerning cable television. We have chosen to limit our comments to the licensing of copyrighted music, an area in which BMI, which represents the largest number of writers and publishers of any music performing rights licensing organization in the world, has been active over the last 33 years

It is BMI's position that the licensing of music should be treated differently from the licensing of copyrighted works which involve such problems as clearance and exclusivity, factors which are wholly absent from music licensing.

Among the points made herein are:

I. The reasons given by CATV operators for special copyright consideration have no application whatsoever to music licensing.

II. Direct negotiation between music licensing organizations and the cable industry will more efficiently assure availability of and fair payment for the use of music than any statutory regulation.

I.

A method of licensing music which meets all of the problems of CATV operators has evolved throughout the world over the course of almost a century. To see how this system functions we should look at the position of the television broadcasting stations, the primary transmitters of the performances which the CATV operators wish to retransmit.

Broadcasters have contracts with three performing rights organizations: Broadcast Music, Inc. (BMI), The American Society of Composers, Authors and Publishers (ASCAP), and Sesac, Inc. These three organizations, through their contracts with many thousands of writers and publishers and with sister performing rights organizations throughout the world, make available to broadcasters the entire repertory to which access is desired by the broadcasting stations. Under these licenses, which run for terms of years, the station may perform any composition in these repertories at any time and by any method that the broadcaster desires—live, recorded, or embodied in films. Payments in accordance with the licenses are made to the organizations involved, which in turn make royalty distributions to their affiliated writers and publishers.

We stand ready to make similar licensing available on non-discriminatory terms to every operator of a CATV system. Let us see what the availability of such licenses does to the only reasons given by the CATV operators for special copyright treatment.

CATV bases its claim to special treatment upon problems of exclusivity, clearance, the restriction of licensing for competitive reasons and an unfounded fear that CATV systems may be required to pay unreasonable copyright fees. None of these problems exist in the field of musical performing rights, where the licensing organizations have eliminated every claim which has been raised by CATV operators. In addition, BMI and its competitors indemnify broadcasters against any copyright liability deriving from the use of their repertories and offer an established procedure for the distribution of royalties.

(a) Exclusivity is not a factor. The rights granted by BMI and its competitors to broadcasters and all other users of music are non-exclusive. Any number of users may simultaneously perform a musical work at the same time. This applies whether the music is live, recorded or filmed. It will clarify the point to consider a broadcaster who is interested in presenting a hit film, "Mary Poppins", to his viewers. He will be concerned, and rightly so, that his screening will be the only one in the region in his chosen time period. He will want assurances that his local competition will not be showing the same film, and that it will not be beamed in from some distant point. That same broadcaster, however, will face no such problems with the individual songs from "Mary Poppins". BMI licenses permit simultaneous performances of these tunes in any number of different outlets—radio, television, night clubs, via background music services and by other users—to the detriment of none. Therein lies a basic difference in the handling of these copyrighted properties.

(b) Clearance is not a factor. Virtually all of the 27,000 domestic users of BMI music have elected blanket licenses under which they can perform any number of compositions contained in the BMI repertory any number of times, at their discretion. Thus, the need to obtain permission or clearance for individual selections or uses is eliminated.

(c) BMI and the other performing rights organizations have no incentive to restrict the availability of their repertories to any CATV system. The sole function of BMI is to collect copyright fees from as many customers as possible and to distribute these fees to copyright proprietors.

(d) There is no possibility that unreasonable fees will be exacted. BMI has repeatedly expressed its willingness to arbitrate the amount of its fees if negotiations prove fruitless. As explained more fully below, BMI is willing to have a requirement for the arbitration of the fees for the retransmission of compositions in its repertory imposed by statute.

(e) In the field of music licensing, procedures for the distribution of royalties among individual copyright owners have long been in effect. We believe that it would be improper in principle and unworkable in operation to impose upon the Register of Copyrights the duty of dividing payments for all classes of copyrighted works among many thousands of individual copyright owners when the machinery for such distribution already exists. BMI has always assumed full responsibility for distributing the fees received by it to its affiliated writers and publishers.

What the CATV systems want is the right to retransmit musical material picked up from broadcasting stations. We stand ready to give them the same rights that those stations have in that same material. This should satisfy all of the needs of the CATV operators.

II.

BMI seeks less rather than more regulation with respect to the use of copyrighted material by the burgeoning cable industry. It seems obvious to us that the best soltuion not only for authors and publishers, but for CATV, is for CATV systems to have access to the musical repertories for all purposes, both retransmission and origination, on a fair basis. That solution begins with a very simple step—negotiation marked by fairmindedness and good will on the part of all participants.

BMI believes that it can successfully negotiate fair, voluntary agreements with CATV operators on a nondiscriminatory basis. It is a fundamental concept of the American free enterprise system that the fairest and most successful method of arriving at a reasonable agreement is negotiation between the parties. A departure from that tradition is not warranted with respect to the performance of music. BMI is certain that serious negotiations between music licensing organizations and CATV operators would be productive.

All performing rights organizations have sought to conclude negotiations. They have tendered court fixation or arbitration of rates of CATV operators. BMI reiterates its offer to submit the issues involved to binding arbitration if negotiation does not prove fruitful. BMI is willing and, indeed, is required by consent decree, to tender nondiscriminatory licenses to all music users. It is willing to tender CATV such licenses in form similar to that which has been acceptable to all other classes of music users.

BMI would be willing to have a requirement imposed upon it for the compulsory arbitration of the fees for the retransmission of the compositions in its repertory. A statutory provision for such arbitration, as opposed to the present proposals of the copyright revision bill, could be limited to the music performing rights organizations who are certified by the Register of Copyrights as having their repertories substantially performed by the broadcasters who constitute the primary transmitters in the United States. Indeed, BMI is ready to permit CATV systems to utilize the music licensed by it during any period of negotiation or arbitration.

In summary, BMI believes that the drastic remedies of statutory fixation of compulsory license rates, coupled with bulk payment to a government official for distribution to the individual copyright proprietors of all classes of copyrighted works is unnecessary and inappropriate insofar as the licensing of music is concerned.

The problem of payment for musical compositions utilized by CATV is not an inter-industrial conflict; it is a problem of livelihood for thousands of creative writers, the encouragement of whose activity has been constitutionally recognized as essential to the public interest. These writers are solely motivated by the desire to cooperate to the utmost with any user of their works who is ready to compensate them fairly.

COMMENTS OF BROADCAST MUSIC, INC., TO THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE JUDICIARY COMMITTEE OF THE U.S. SENATE

(January 20, 1972)

Broadcast Music, Inc. (BMI) welcomes the opportunity to respond to the letter of Thomas C. Brennan, Esq., Chief Counsel, dated December 15, 1971. It will concentrate its comments on "whether any particular type of program material, such as music or professional and collegiate sports, requires separate treatment in the cable section of the copyright bill."

BMI is a music performing rights licensing organization. Our copyright law specifically provides for the protection of the right publicly to perform music for profit and it is only through BMI and organizations similar to it that this right can successfully be implemented. BMI's sole function is to license to music users of every class and type the right to give non-dramatic public performances of copyrighted musical compositions for profit. Affiliated with BMI are approximately 25,000 composers and lyricists and approximately 9,000 publishers. These are all wholly independent. They convey to BMI no rights in their musical compositions, other than the performing right.

In addition to making available to music users all the works of its affiliated writers and publishers, BMI, through reciprocal contracts with more than thirty foreign performing rights organizations, makes similarly available music of the rest of the world. Almost without exception, all of BMI's licenses to approximately 27,000 music users in the United States are non-exclusive "blanket" licenses which permit the licensee to perform the entire repertory of BMI without individual clearance [illegible] permission. BMI divides all of the money it collects, except for its expenses and necessary reserves, among the writers and publishers whose works it represents.

The licensing of the right to perform non-dramatic musical compositions publicly for profit is unique. Section 111 of S. 644 was designed to meet certain specific problems which CATV operators feared would restrain the proper growth in the public interest of CATV systems. All of these problems have been solved by a system of licensing which has, for decades, operated, not only in the United States, but all over the world and which serves the needs of all of the industries which utilize musical performances for profit. No other system than the one which has been so patiently evolved can properly meet the true needs both of the writers and publishers of music and of CATV operators.

The questions which the CATV owners raised and which are inapplicable to music licensing are:

1. Unlike every other type of program material, no problems of exclusive rights are involved in music licensing. The rights granted to all users of music by BMI and its competitors are non-exclusive, whether the music is live, recorded or filmed. Every user in every market may simultaneously perform the same composition. Whereas a film may be licenses to only one station or one CATV operator in a market, music licenses permit performance of a musical composition on any number of different outlets—radio, television, night clubs, background music services and other users, to the detriment of none. To give an example of how this operates, only one person in a community may have the right to show the film "BORN FREE." The musical composition "BORN FREE," which is incorporated in the picture, may, however, be performed by every establishment that uses music, from skating rink to television station. This crucial and basic difference is alone enough to require the separate treatment of music licensing.

2. CATV operators expressed fears about the complexity of clearing each individual musical composition or performance. This problem does not exist in music licensing. Virtually all of the 27,000 users of BMI music (and this is equally true of its two competitors) have voluntarily elected blanket licenses under which they can perform all of the musical compositions in the BMI repertory at any time and by all means without the need of separate or individual permissions or clearances.

3. CATV operators expressed the fear that their right to disseminate programs would be limited by a restriction of such right for competitive reasons. No possibility of such restriction exists in the music licensing field. BMI and its competitors are organized and exist only for the purpose of licensing performing rights on a non-discriminatory basis to as many customers as possible. This is BMI's sole function and its sole economic interest. It acts on behalf of approximately 25,000 composers and lyricists and 9,000 music publishers whose only interest is to collect reasonable fees from as many people as possible.

4. CATV operators have expressed concern with respect to the difficult problem of distributing royalties among individual copyright owners. No such problem exists in music licensing. BMI and its two competitors take full responsibility for distributing the fees they collect among the individual writers and publishers involved. The broadcasting industry, for instance, makes payment to three organizations and has no problems with respect to further distribution.

5. There is no risk that unreasonable fees will be exacted. BMI's position has been and is that, if negotiation does not result in voluntary agreement, it will

leave the determination of the fee to binding, dispassionate arbitration. One of its two competitors, the American Society of Composers, Authors and Publishers (ASCAP) arrives at the same result through fixation of fees by the Federal Court. The other, Sesac, Inc., has similarly expressed willingness to arbitrate.

BMI speaks for no insubstantial interests. The music it licenses is a handmaiden to almost all television programs and it constitutes the major focus of interest of much television programming. When it comes, however, to the performance of music by radio (apparently with no restrictions of any kind on the extent of retransmission of programs from radio stations) it must be kept in mind that the overwhelming bulk of radio programming consists of the performance of music. Music licensed by BMI occupies a major role in all musical programming. The music licensing organizations should justly be considered to be in the forefront of "copyright owners."

BMI is, moreover, crucially important in the furtherance of the basic national interest in encouraging and maintaining the flow of music. Payment from performing rights constitutes the bulk of the income of most composers, lyricists and music publishers. Almost 90% of this income is derived from broadcasting. The basic theory of the copyright law, founded on the Constitution itself, is that the function of copyright is to promote the progress of art by the establishment and protection of the rights of authors. This right has always been implemented by the payment to authors of a proportion of the amounts received by commercial enterprises which use copyrighted works in public performance. The fee is traditionally arrived at by arms-length bargaining. In the case of music licensing there is ultimate recourse to arbitration or (in the case of ASCAP) court fixation of fees, where voluntary bargaining fails.

We cannot empasize too strongly how satisfactorily this system of licensing the performance for profit of nondramatic musical compositions has worked. Broadcasters who have licenses from the three established United States licensing organizations have for decades been unharassed by any claim by others. They use music without hindrance to satisfy the varying tastes of American audiences. They have available to them not only the music of the United States but, through reciprocal agreements between U.S. performing rights licensors and performing rights organizations in other countries, all the music of the world. It should be noted that in other countries of the world CATV is presently included in this system of licensing and is treated in precisely the same way as broadcasting. A system that works with such simplicity and effectiveness should not be destroyed without preponderating necessity.

As we have indicated, the expressed fears of CATV operators have no existence in music licensing and including such licensing in a system designed to deal with the wholly different problems involved in the licensing of other programmatic material is without justification. We must also add that music is no less entitled to special treatment than sports events.

The compromise proposal put forward by Mr. Whitehead and accepted, with some reservations, by the National Cable Television Association (NCTA), the National Association of Broadcasters (NAB) and a group of motion picture producers states:

"Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration, failing private agreement on copyright fees."

We accept this principle.

The first step in implementing such a proposal would obviously be negotiation. Unbelievable as it may seem, there has been no negotiation with the music licensors. BMI was not a party to the compromise agreement. It knows the terms of such agreement only from the trade papers. No one spoke for the music used so largely in television and so predominantly in radio. Since the basic quid pro quo of the compromise relates to exclusivity, no part of that consideration extends to the writers and publishers of music. The music licensors are left out in the cold.

BMI has long sought to negotiate with the NCTA. We reiterate in the strongest terms our willingness and desire to negotiate in the utmost good faith with CATV owners. We are confident that, if good faith prevails, a satisfactory voluntary agreement will result. Such an agreement, clearing the decks for the unrestricted use of our musical repertory under a single license on reasonable terms, for all purposes, in all manners, and by all means of dissemination utilized by CATV is what the public interest to be served by the CATV industry requires no less desperately than do the writers and publishers of music.

The acceptability of arbitration has been widely supported. Moreover, both the 1970 Rand Memorandum and the recent Sloan Commission Report recognizes the availability of the blanket music licensing system of the music performing rights organizations as a means of solving some of the problems involved in copyright licensing.

We stand ready to make our repertory available to CATV systems in the same way as it is made available to every other class of music users, including broadcasters. We are willing that the CATV systems should have full rights to our repertory under a single license and on a non-discriminatory, non-exclusive basis for every type of use. We stand ready to negotiate and, failing negotiation, to have the fees determined by dispassionate arbitration. We are ready to offer such licenses for a reasonable term and on payment of a reasonable percentage of the gross receipts of the CATV system. We will not require individual clearance of specific works or performances of works.

If the CATV operators do not implement negotiation or arbitration on such a basis, we will accept legislation which provides for compulsory arbitration of all retransmissions. Such statutory compulsory arbitration could be made operative only with respect to performing rights organizations certified by the Register of Copyrights as being primarily engaged in the licensing of copyrights music substantially performed by United States broadcasters, the primary transmitters.

The necessity for special treatment of music renders inapposite extended comment on the other two questions raised in Mr. Brennan's letter.

Clearly, however, we do not favor the exemption of CATV systems having fewer than a stated number of subscribers. The persons who utilize music publicly for profit should pay a reasonable fee. The accumulation of payments from a substantial number of small operators results in necessary and deserved compensation for the creators of musical works. Fixing compensation by a percentage of gross recipients prevents such payments from being burdensome to smaller commercial operators.

With respect to the question of "whether royalty rates should be determined by a single graduated formula of a percentage of the gross receipts paid by subscribers for the basic service of providing secondary transmissions or whether the formula should provide a basic rate for carriage of local signals, with an additional charge related to the number of distant signals carried by a particular system," we emphasize that the method of music licensing that we put forward requires payments of a percentage of the gross receipts of the CATV system from all sources covered by our license.

Even since section 111 was formulated, CATV systems have become more sophisticated in their origination of programs, choice of programs, carriage of distant signals over the air by a variety of technical means, number of channels available, carriage of advertising, interconnection of systems, pay TV, ultimate availability of satellites and in other respects. No one can foretell from what source any individual CATV system will derive important income. We feel that the music licensing organizations can achieve a reasonable rate of payment only by arms-length negotiation or, failing this, by arbitration or court fixation which permits the basing of fees on all applicable income.

Not only is the position we advance essential for the support of the writers and publishers of music, but it is in the best long-range interest of CATV, which should have the same unlimited access to the music of the world as is enjoyed by every other type of music user. The music performing rights licensing system which is operative all over the world functions with extraordinary efficiency in the public interest. It obviates every problem which the CATV operators have raised as a possible limitation on the growth of their industry. It exposes the CATV operators to no unreasonable fees, but only to such fees as, in the absence of agreement, are impartially determined. To discard such a system in the absence of any existing need or grievance would, indeed, be to throw the baby out with the bath water.

SESAC INC.,
New York, N.Y., July 25, 1973.

THOMAS C. BRENNAN,
Chief Counsel,
Old Senate Office Building,
Washington, D.C.

DEAR TOM: In addition to the joint statement of ASCAP, BMI and SESAC being prese[illegible]d on August 1st on the cable television matter, it was agreed that our organization could submit an additional statement. I am therefore enclosing 15 copies of my statement to you of January 12, 1972 which I would like to have made part of this Sub-Committee's record.

Sincerely,

SESAC Inc.
Albert F. Ciancimino,
Counsel.

Enclosure.

Statement of SESAC Inc. Through Albert F. Ciancimino, Counsel, to the United States Senate Sub-Committee on Patents, Trademarks and Copyrights

By letter dated December 15, 1971 Thomas C. Brennan, Chief Counsel to the Sub-Committee on Patents, Trademarks and Copyrights, invited SESAC to comment on the content of modified Section 111. More specifically, three issues were referred to us in Mr. Brennan's letter for comment. I would like to treat each of these items in the inverse order in which they were listed in Mr. Brennan's letter.

I. WHETHER ANY PARTICULAR TYPE OF PROGRAM MATERIAL SUCH AS MUSIC OR PROFESSIONAL AND COLLEGIATE SPORTS REQUIRE SEPARATE TREATMENT IN THE CABLE SECTION OF THE COPYRIGHT BILL

As the second oldest, but smallest of the three major performance licensing organizations in the United States, SESAC has, during its more than 40 years existence, successfully negotiated voluntary licensing agreements with virtually every radio and television station in the United States, with thousands of hotels, nightclubs, cabarets, as well as with other users of music such as professional football and baseball teams. We have, in each instance, made available to such music user a repertory of more than 120,000 copyrighted musical compositions for use on a non-exclusive, non-discriminatory basis in return for an annual license fee which has been accepted by virtually every music user as reasonable.

There has thus far been little need for resort to an individual tribunal to resolve disputes arising out of SESAC's rate schedules. However, SESAC has gone on record, both before the Whitehead Commission and this Senate Sub-Committee, as being willing to accept a system for compulsory arbitration in the event that cable television operators and SESAC cannot reach a private agreement.

Without belaboring a point which has often been made in the past, I believe it should be clear to all concerned that vis-a-vis the music copyright proprietor the cable television industry does not have any of the fundamental problems which have existed between the cable television industry and other types of copyright proprietors such as motion picture owners and broadcasters. We do not create difficulties with the cable television operator on such issues as exclusivity, availability and distribution of monies collected. I believe that the performing rights industry has also met any anxieties on the part of Congress concerning the possibility of unreasonable rates being demanded of the cable television industry by our willingness, in the case of SESAC and BMI, to submit to compulsory arbitration and, in the case of ASCAP, to resort to the Courts of the Southern District of New York in accordance with their consent decree.

It is for these reasons that SESAC strongly urges this Sub-Committee to provide for separate treatment in S. 644 for the licensing of cable operators to carry non-dramatic performances of copyrighted musical works on secondary transmissions. A compulsory license for the use of non-dramatic musical compositions is necessary only in the event that cable operators do not have available to them a determination by an impartial tribunal in the absence of a mutually agreed-upon rate.

II. EXEMPTION OF SMALL CABLE SYSTEMS

The second issue on which our comment has been invited is whether or not there should be an exemption from copyright payments of independently-owned cable systems having fewer than 3,500 subscribers. SESAC can see no justification whatsoever for such an exemption. There seems to be no valid reason why a distinction should be made in the area of public performance of copyrighted music for profit between a small and a large cable system. The fact that smaller systems may not be making as much profit as larger systems will undoubtedly be reflected by a smaller copyright payment to music copyright proprietors should some rate system based upon a percentage of income be adopted. It certainly appears to be self-evident that secondary transmissions by smaller systems are, in substance and form, identical to secondary transmissions by larger systems in context of the theory of licensing public performances for profit in both the Copyright Law of 1909 and, thus far, the proposed new Revision Bill S. 644.

III. FORMULA FOR A STATUTORY RATE

SESAC has been the only one of the three major licensing organizations not to charge radio and television stations on the basis of a percentage of their gross receipts. SESAC's rates in the area of television are based in the main on the television station's advertising rate and the population of the market area served by the station. In the area of radio licensing, SESAC's annual fees are based upon factors which reflect the radio station's profit potential. These factors are the station's location, the size of the community served, the hours of operation, the advertising rates and, most important of all, the power classification of the station. In order to promote uniformity in the area of licensing cable television, SESAC has advised representatives of the cable television industry that it will accept a formula based upon a percentage rate as opposed to a flat fee rate.

SESAC favors the principle of compulsory arbitration failing private agreement on copyright fees for music. SESAC does not favor the principle of compulsory licensing. SESAC is of the opinion that the availability of compulsory arbitration will insure the negotiation of a fair and reasonable rate for the use of music. Such a rate should be predicated upon a percentage of all revenue received by a cable system and not solely upon subscriber income.

The flexibility and acceptability of a voluntary schedule of fees rather than statutory rates, is I believe, quite apparent. However, should there be a statutory rate formula in S 644 applicable to non-music copyright proprietors, it is suggested that such a formula should provide for a percentage of the gross income of all revenues received by the cable system. As to the two alternatives set forth in Mr. Brennan's letter of December 15, 1971 it would appear that the first alternative of a percentage of a single graduated formula wins by default. I fail to see the justification of making additional charges for the number of distant signals carried by a particular system without regard to qualitative content of the signal or the profit potential caused by importing such signal. By taking a percentage of all revenues derived by the cable system, it would seem that all factors are considered, including the number of distant signals carried. Presumably a system carrying an abundance of distant signals would be more attractive to the consumer and therefore result in greater revenue to the system and thus a higher copyright fee.

In conclusion, SESAC feels that music should most certainly be treated separately from other types of program material. With the safeguard of compulsory arbitration, all that is truly necessary in S 644 would be a statutory provision for such compulsory arbitration in the absence of a voluntary negotiation of rate by and between the cable system and the music copyright proprietor. Payment of royalties for the use of music should be made directly to the licensor of the performing rights. Only in this manner, will the Senate allow for the economic, streamlined method of making available substantial repertories to the cable industry for any and all type of use, i.e., both secondary transmissions and the origination of programing by the cable system. A compulsory license in the statute dealing with secondary transmissions will not solve the issue of licensing primary transmissions on the part of the cable system. We submit that a completely voluntary negotiation between industries backed up by compulsory arbitration is the solution.

Respectfully submitted.

Albert F. Ciancimino,
Counsel, SESAC Inc.

Mr. Brennan. The National Cable Television Association has been allocated 40 minutes.

Would you identify yourself for the record?

Mr. Foster. Mr. Chairman, my name is David Foster. I am president of the National Cable Television Association. On my immediate right here is Mr. Stuart Feldstein, who is general counsel of the association. On his right is Dr. Bridger Mitchell, an economist who will be presenting some testimony regarding the economic facts surrounding the livelihood of the cable television industry. And on my left is Mr. George Barco, who will give the third segment of our testimony. Mr. Barco is a cable system operator and a distinguished member of the Pennsylvania Bar. We felt that it was most important at this time to let you have the viewpoint of an actual cable television operator, someone who is facing the economic facts of our industry.

Senator McClellan. Who is the gentleman immediately on your right.

Mr. Foster. Mr. Stuart Feldstein is NCTA's general counsel. He will not be making a presentation but will be available to answer questions.

Mr. Chairman. I have submitted a rather lengthy statement, which I would like to include in the record. I will not read this statement at this time, but rather will speak to some of the points that have been raised by the prior presentations.

Senator McClellan. You want all of these submitted? They are extensive statements.

Mr. Foster. Yes.

Senator McClellan. Very well.

They may be received and made a part of the record. You have 40 minutes. If we have any questions, we will try to do that on our time. We want to give you the opportunity to make your presentation here, but we want to move along, to expedite it.

Proceed.

STATEMENT OF DAVID FOSTER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION; ACCOMPANIED BY DR. BRIDGER MITCHELL, ECONOMIST; GEORGE J. BARCO, COUNSEL, PENNSYLVANIA CABLE TELEVISION ASSOCIATION; AND STUART FELDSTEIN, GENERAL COUNSEL TO NCTA

Mr. Foster. I should also note, Mr. Chairman, that in the audience today are a very large number of cable system operators. I would say most of them are smaller operators, what we call our mom and pop operations. We say that with no lack of respect because many of these actually are mom and pop operations where the husband in the family is the technician for the system, and the wife keeps the books and answers the phone. These are people that are really concerned about the impact of copyright legislation.

Let me first answer the question that you asked Mr. Valenti about his views on copyright schedules and fee schedules that differ from the ones included in S. 1361. Let me say that although we are supporting S. 1361, on page 35 of my testimony I have indicated that the facts that we have been able to develop with the research that Dr. Mitchell has done and the input that we have had from our cable operators, indicate that a fee schedule of 50 percent lower than the fee schedule included in S. 1361 would be more appropriate.

As I have said, we are supporting the bill because we think it is a bill that can pass the Senate and thus, we can get on with this copyright issue. We have stated that we support the bill and we believe that all of the facts that will be developed will support that lower fee schedule.

Senator McClellan. What do you base that on? Just the idea that you want to get out of it as politely as you can?

I want something concrete here to show us if we can. I asked the other side if they were prepared to document or submit what they consider to be reasonable fees. They haven't.

I wonder if you have come now with something concrete, that you could submit to us, other than you say, well, you support the bill. In other words, show why the fees should not be more.

Mr. Foster. Dr. Mitchell has a rather detailed testimony and I believe that he will develop some facts along that line. He will demonstrate that the fee schedule that is in the bill will have a very serious economic impact on the industry and, in many cases, will take profitable cable operations from black ink into red ink.

Senator McClellan. All right. Proceed.

Mr. Foster. For the first 5 minutes of Mr. Valenti's testimony, I thought that the National Cable Television Association was here to defend a breach of contract suit, but let's be very clear about this one point.

Senator McClellan. What about that consensus agreement?

Mr. Foster. Mr. Chairman, we have supported the concept of cable television's paying reasonable copyright fees since 1968. You will recall in 1968 that the Supreme Court decided that cable TV operators did not have to pay copyright fees.

Senator McClellan. That was on local broadcasting, wasn't it?

Mr. Foster. Yes, sir. That was essentially the decision of the court. But notwithstanding that decision, the National Cable Television Association has continually adopted as its official position that the industry should pay reasonable copyright fees. We did that long before the consensus agreement and we feel that was the basic, undergirding intent of the consensus agreement—to work for the early passage of copyright legislation.

We feel that S. 1361 represents that kind of copyright legislation that can be passed at an early date so that we can get on to the more pressing issues facing this industry.

Now let's talk a little bit about what has happened since the consensus agreement, since we have been negotiating with the motion picture interests, with music interests. But I will speak primarily about the motion picture interests. Continually since the consensus agreement—at intervals as often as once every week or as often as once a month—we met in extensive negotiating sessions to try to determine whether or not there could be a meeting of the minds between the parties on what might be a reasonable copyright fee.

Both parties hired expensive knowledgeable economists with a long list of credentials to try to develop facts and circumstances which would provide some realistic basis for those negotiations. We found that the parties positions were far apart and that no factual data that was available to us could bring the parties any closer together.

Why was that the case? Primarily because cable television is still in its infancy. It is a very, very small industry. It is primarily operating in rural areas, in smalltown areas, and the major big-city markets—which is really what we are talking about here in terms of the future of these copyright papers—have not yet been wired. And those small areas close to the big-city markets that have been wired do not provide us with the kind of economic data that would provide a basis for a reasonable negotiation. So after many months of those negotiations, we came to the conclusion that there was no factual basis and, therefore, it was appropriate to turn this matter over to the wisdom of this committee and the Senate to come up with a fee schedule. By setting down an initial fee schedule in the bill, the concept of arbitration could then come into effect at a time when we would, hopefully, have some hard factual data based upon the experiences derived over the next 3 years.

During that period of time, we will be paying copyright fees and we will have experienced the copyright payment concept. The allocation of those fees can be worked out. The economic impact of those fees on our industry will become apparent. And we think that it is then the appropriate time for the satutory tribunal to do its work.

If that tribunal were to be convened today, it would have the same difficulties that the parties had during the past 2 years trying to conduct negotiations—they would simply be speculating as to the future of this industry, but they wouldn't be dealing with anything except one economist theorizing from one direction and another economist theorizing from the opposite direction. What would come up would be certainly no more valid, and I suspect a lot less valid, than the wisdom of the Senate.

And, therefore, we are supporting the concept of S. 1361 that the fee schedule to be imposed at this time with arbitration or a statutory tribunal, whichever you want to call it, coming into play at a time when we have evidence to deal with.

Now let's talk about what the cable television industry really is, because I think we have to have a very clear picture of that to understand what these copyright payments mean. I am now talking about the community antenna aspect of the cable television industry.

What do we do? Well, we put up an antenna at some point on top of a mountain, and from that antenna we receive television broadcast signals off the air. We don't alter those signals in any way other than to improve the quality of the signal. We then put it on a cable, a wire which goes into a family's home and into their television set.

We cannot alter the programing content in any way. We cannot put any commercials on those stations. We cannot take off any commercials. We cannot take off any programs unless we are required to do so by the rules of the FCC.

If we are carrying a channel, and it's carrying a program that we don't want to carry, we must still carry it. We have no selection process at all. We must take what they give us and all we can do is improve the quality of that signal and deliver it to some homes that wouldn't otherwise have seen that signal. That sponsored message that paid the full price of that program is now being carried to a home which ordinarily would not receive that broadcast signal.

Senator McClellan. In effect, you mean to say that your service is to extend the coverage?

Mr. Foster. Yes, Mr. Chairman. As a matter of fact, some people have suggested—and not at all facetiously—that the broadcasters ought to pay us for carrying those signals into areas where they would not otherwise go. We are giving their sponsors a break.

Senator McCLELLAN. Do they have any effect on what they charge for advertising?

Mr. FOSTER. In many cases, Mr. Chairman, we understand that it does. We understand that they base their audience rating on the cable system population and thus increase the price they charge for the commercials.

I think you can understand that against that background, where we have no choice of what programs we carry, all we do is improve the quality of that program and extend it beyond a geographical range.

Under the circumstances, you can understand why it has been difficult for the cable television industry to accept the concept of paying copyright fees. To us, it sounds like—I use a phrase that Fred Ford invented—I'm glad that Fred is here today—"two tickets for one show." Somebody has already bought the ticket to the show, and now we're being asked to buy it again.

Now, Mr. Chairman, we have accepted that concept, the concept of paying reasonable fees. But I think against that background, you can understand why we feel that those fees should be minimal at the outset, and that the economics of the marketplace show what they might be in the future.

Now let me address a couple of points before I turn the microphone over to my associates. There is not an exemption in the bill for small systems. Many of the small systems operators who are here today will be urging you, and have urged you in correspondence that I know they have sent you, to exempt all systems under 3,500 subscribers. These are the small growing systems. They have particularly difficult economics associated with them.

The motion picture people have told us time and time again that they are not looking at the small systems for the revenues. They are looking for the large, big city systems that are yet to be built.

And therefore, it is our official position, Mr. Chairman, that the small systems under 3,500 subscribers should be exempt from the payment of copyright fees. On the other hand, we do not feel that either nonprofit or governmental systems should be exempt. We feel that since they are directly competitive with free enterprise cable systems, they should pay the same kind of copyright fees.

Before I hand over the microphone, Senator Burdick, I would like to answer the question that you asked about why we should have a compulsory license with one flat fee across the board for the industry. The average television station carries approximately 5,000 programs per year. Let's say that the average cable television system carries five television stations. That would mean that the individual cable system operator would have to negotiate a copyright fee for about 25,000 individual programs.

He has no choice as to whether he has to carry those 25,000 programs. He can't say, I don't want to carry this one. It's a worthless program. He has to carry it under any circumstances.

Therefore, we feel that across the board compulsory license is the way to go. I think that you can imagine how difficult it would be for some poor cable operator down in Arkansas with 500 subscribers to have to come down to Mr. Nizer's office in New York and negotiate

25,000 individual copyright contracts. It would be an unreasonable burden.

At this point then, I will turn the microphone over to Dr. Bridger Mitchell, who will address what economic data we have been able to develop, Senator.

Dr. MITCHELL. Senator McClellan, Senator Burdick, my name is Bridger Mitchell. I am appearing at this hearing in my capacity as an economic consultant to the National Cable Television Association. While I am affiliated with the University of California at Los Angeles, and the Rand Corp., the views and conclusions expressed are those of the author and should not be interpreted as representing those of the university or the Rand Corp., or any of the agencies sponsoring its research.

In the context of the American economy, cable television today is a small industry. About 7 million homes buy its television reception service, paying on average of slightly more than $5 per month.

This year, approximately 3,000 cable systems are in operation, with annual revenues of about $400 million. Ownership of a number of these systems is by a single firm. The 10 largest firms account for about 44 percent of all subscribers.

Cable's development to date has been almost exclusively in the smallest television markets and in the fringe reception areas of a few larger cities. In those areas, the willingness of consumers to subscribe is due to the limited number of broadcast television signals available and their frequently poor reception quality which results from distance from the transmitter, or intervening terrain.

The major promise for cable television is yet to be realized. As Mr. Foster has emphasized in his statement, about 85 percent of the homes in America are located in the 100 largest television markets, and until March of last year, construction of cable systems in these markets was effectively blocked by policies of the Federal Communications Commission.

These markets differ significantly from the communities which have been wired to date, especially in their relative abundance of broadcast signals and generally high-quality aerial reception.

Any projection of the future growth of this industry and the prospective effects of the copyright fee schedules proposed to this committee must incorporate these central facts. I have attempted to provide such an analysis in the paper, "Cable Television Under the 1972 FCC Rules and the Impact of Alternative Copyright Fee Proposals," which has been appended to Mr. Foster's written statement.

Very briefly, the method of analysis I have employed is to construct a financial model of a cable television system which incorporates the major factors affecting a system's size, costs, revenues, and profitability. For example, capital expenses depend on the geographic size of the system in miles, the amount of cable which must be laid underground rather than strung from existing utility poles, and the proportion of homes in the service area which actually subscribe, generally referred to as the penetration rate.

Operating costs are similarly related to the number of subscribers, the number of imported signals, taxes, and regulatory fees. In the same manner, revenues are determined by the monthly subscription charge, the system size, and the penetration rate.

But penetration, the generally employed measure of consumers' demand for cable service, itself depends on the monthly charge and the increase in both the number and quality of television signals on the cable relative to those available using only a home antenna.

This method of describing the economics of a cable television system was first developed in 1970 to analyze the then proposed FCC rules in a paper which Dr. William S. Comanor and I prepared for the Commission proceedings, and a number of researchers have subsequently employed versions of this model to explore related questions about the industry.

By programing the financial model for calculation on an electronic computer, the effect of a variety of different assumptions and conditions can be readily determined. Thus, I am able to adjust the size, number of broadcast signals, construction methods, and other parameters to the conditions expected to be obtained in several different types of communities.

Consequently, these typical systems are representative of the circumstances and profitability of most cable systems that could be built in the major markets.

My present study takes into account the final Commission rules and is addressed particularly to the impact of alternative copyright fee schedules on cable systems in the large urban markets. Although I have allowed for the effects of providing public access channels and programing locally originated by the cable system, as required by the FCC rules, I haxe excluded from the analysis both the costs and the revenues which may eventually result from leased channels—including pay television channels and other nonbroadcast services. Since programing shown on these channels is fully subject to the present copyright laws, cable operators will have to bid for the rights to carry such material, and it is not necessary to examine the operation of that market here.

Let me now attempt to summarize my major findings; greater detail may be found in the paper itself.

Conditions for the development of cable service vary widely throughout the 100 largest markets. Near the center of these cities, penetration, the percentage of homes that actually subscribe, will range from 22 percent to 35 percent for typical systems. These urban areas generally receive all three network signals and in the larger markets there are one or more independent stations with good reception.

Even in the absence of copyright fees, profit rates for centrally located systems will be lower than returns available to capital invested in other industries. Except in exceptional circumstances, cable systems will not be built in the central cities under present FCC regulations.

Toward the edges of the major markets, signal quality, particularly for UHF broadcast stations, deteriorates rapidly. Typically, systems located in such communities will achieve penetration rates of 34 percent to 45 percent.

As a result, before payment of copyright fees, the large or multiple-owned systems will earn before-tax real rates of return of between 9 and 13 percent. These profit rates, while not particularly high, are likely to attract equity investors who are able to finance an important fraction of the system from borrowed capital.

Now, when the schedule of copyright fees proposed in S. 1361, which is graduated from 1 percent to 5 percent of gross revenues, is added to the cable system's operating costs, the effect is to reduce rates of return a full percentage point. For example, a system of 10,000 subscribers at the edge of one of the 50 largest markets would find its profit rate reduced from 11 percent to 9.9 percent, a little more than 1 percentage point.

Depending on the capital structure of the system, such a change can reduce the return to equity capital by 2 or 3 percentage points. While this change may not at first appear particularly large, these figures may be put into perspective by noting that the proposed copyright fees would have reduced the before-tax net income of eight large multiple-system operators by an average of 19 percent last year.

Because a high proportion of the major market systems would encounter similar subscriber and cost conditions, the prospective returns to cable investors are only marginally attractive when compared with other industries, and then only on the suburban fringes of most cities. In this situation, copyright fees of the magnitude proposed in S. 1361 can be a significant deterrent to construction of many new systems.

I have in addition analyzed the probable effects of a fee schedule exactly one-half of that in S. 1361, that is a schedule graduated from ½ percent to 2½ percent of gross revenues, depending on systems size. Under such a schedule, profit rates of systems located at both the center and edges of major markets are reduced by about one-half percentage point.

Finally, a flat 16.5-percent copyright fee was analyzed. The effect of additional costs of this magnitude are unambiguous. For every type of cable system that was investigated, the 16.5-percent copyright payment would create a decidedly unprofitable investment climate throughout the top 100 markets, far outweighing the limited prospects for cable development which have been opened up by the 1972 FCC rules.

Let me conclude by noting that, although I have not gone into them in this statement, the 1972 FCC cable television rules substantially restrict the distant signals which may be carried and impose costly requirements for nonbroadcast services. It is primarily these regulatory policies which will limit development of cable service in suburban and fringe areas and result in little or no central city construction.

Because the rules reduce the returns to invested capital to only marginally attractive levels, the prospects for major market cable service are now especially sensitive to relatively small increases in operating costs. The impact of even the copyright fee schedule proposed in the bill before this committee may well be sufficient to delay or cancel construction of an important proportion of systems that would otherwise be built in the next several years.

Thank you.

Mr. BARCO. Chairman McClellan, Senator Burdick, Senator Fong. I am George J. Barco. For the past 17 years, I have served as General Counsel of the Pennsylvania Cable Television Association.

Pennsylvania is the State in which the cable television industry started, and there are some 300 CATV systems operating in over 1,100 communities—more than in any other State in the Nation—serving over 2 million television viewers. It has been my privilege to serve as national chairman, then known as president, of the National Cable Television Association, and I was a member of its board of directors for 15 years.

For the past year, I have served as a member of the NCTA Copyright Committee. Also, for the past 20 years, I have been, and still am, a part owner and the president of several cable television companies.

By way of further introduction, I believe I should state a disclaimer, for the benefit of NCTA, and for the information of the committee, that while I have been an active participant in the affairs of NCTA over the years, the views I am about to express on the copyright issues are my own, and in many respects do not correspond with the officially adopted views of NCTA as an organization.

At the same time, let me state that I believe my views reflect those of many, many cable operators all over the country. There is no single matter which has concerned the CATV industry for the past 7 or 8 years more than copyright. Over this period, I have talked on a person-to-person basis with literally hundreds of cable operators and virtually every industry leader on the subject.

Let me state finally by way of introduction, that I view my task today as awesome and the situation for the cable industry as critical, if not desperate. Under the circumstances, I can only state the situation as I see it fully and frankly to the committee, without regard to certain existing predelictions, interests and objectives among the forces interacting on the copyright issue, within and without NCTA. I'm appreciative of the opportunity of appearing before you today.

In October 1968, the Board of Directors of the Pennsylvania Association, following a careful consideration of the copyright issue, adopted what has been termed as the Pennsylvania Position on Copyright. Its underlying principle is simply that television signals received off the air should not be subject to the payment of copyright fees so long as similar payments do not apply to reception by conventional antennas in the same community.

The position recognizes that copyright fees should be payable for copyrighted programs received by microwaving or similar long-distance transportation, and that such microwaving should be subject to regulation in view of its impact on television broadcasting, copyright property rights, and the interrelated market patterns of both.

While recognizing the legitimate interests of many who are interested in providing direct television program services, and a variety of other communication services in the metropolitan area by cable, the Pennsylvania Position urges that the television reception function for off-the-air signals by CATV should not be colored by the possible future development of cable television, nor should the inherent rights in such reception be traded as a part of any compromise between the conflicting interests concerned in large city cable television developments.

The Pennsylvania Position has received wide support in the industry throughout the Nation for it was grounded on the basic concept and fact of CATV performing the community antenna reception function for signals received off the air. Further, it seemed incomprehensible that liability to copyright fees should depend on the accident of topography, or in the real-life situation of the television viewer, whether he was living in the high area where a conventional antenna did the job, or whether he lived behind the hills or along the river where community antenna service was required or desirable to provide satisfactory television reception.

How could there be any justification for requiring the subscribers to make an additional payment to the copyright owner who had already received payment in his contractual arrangements for the broadcasting, paid ultimately by the television viewers, including CATV subscribers, in the advertising costs of purchased products?

Besides, until recently, the copyright owners made repeated public assurance that they were not interested in payments related to such television reception services, but were interested in only the large city markets where distant signals were to be imported.

And most important of all, the Supreme Court of the United States in the *United Artists* case made a determination, in June 1968, recognizing and establishing in legal terms the concept always understood by cable men in practical terms by the very nature of their operations.

Yet, in the intervening years from 1968, the membership of National Cable Television Association was sharply divided on the copyright issue. One segment considered any payment of copyright fees for signals received off the air an infringement of very basic rights, for the reasons just mentioned.

The other segment viewed payment of copyright across the board as the only realistic means for securing importation of distant signals thought to be necessary for the economic viability of cable television for the large cities if and when such system construction occurs.

To fully understand the circumstances of this division, it must be understood that the membership of NCTA is not a homogeneous group; and that all members of NCTA are in the cable industry, but a substantial number of them, and particularly some large multiple system owners, also have other interests which are at variance with CATV interests as such, as, for example, television broadcasting and copyright interests.

It is not surprising that the persuasions of the copyright payment segment within NCTA have been weighted and influenced by these interests and still are today.

As is well known, the event of decision came in November 1971, in the context of the Office of Telecommunications Policy Compromise, which was approved by the NCTA Board of Directors because it appeared to represent the only available basis upon which there was any possibility for removing the Federal Communications Commission freeze on cable television development, particularly in the large markets.

Whatever differences there may have been within NCTA over philosophy as it relates to the regulatory scheme and the payment for copyright, I can state that I believe that every possible effort was made by the NCTA Copyright Committee, and others of the CATV industry concerned with the implementation of this decision, to accommodate to the situation.

I can state from my own personal knowledge that the attitude, demands and conduct of those representing the movie copyright owners during the sessions which I attended were such that all efforts to deal with them were vigorous exercises in futility.

The representatives of these copyright owners were completely uninformed as to the nature of CATV operations, their financial aspects and the specific current problems facing the industry; and they were evidently determined to maintain their ignorance on these matters. Furthermore, they displayed a callous disregard of the consequences of their exorbitant and totally unrealistic demands.

Thus, when they were informed that our industry simply could not pay the demanded 16 percent fees for movies alone, added to fees proposed for music and other copyright of over 12 percent, the response was a blatant "pass it on to the subscribers and tell them it is a cost of doing business."

When we attempted to cite the absolute and practical limitations to service charge increases by way of clearances through the municipalities on whose franchises the operations must depend and by way of business fact that subscribers either could not—or would not—make such payments, the blunt rejoinder was "just pass it on to the subscribers anyway."

I must observe that the FCC, in insisting on copyright payment as one of the conditions to the easing of restrictions on CATV growth, placed a perhaps unforeseen, but nonetheless, tremendous pressure on the CATV representatives in the bargaining process. The copyright owners were under no similar burden, and, in fact, they maximized their advantage by insisting, in effect, that this condition amounted to a requirement that CATV settle on the terms of the copyright owners.

In the end, it was painfully clear to even the most optimistic and the most tolerant of those representing NCTA that fair, realistic, and responsible dealing with the copyright owners had been and is an utter impossibility.

Gentlemen, I put aside completely my firm conviction that copyright payment for the reception of television signals received off the air is wrong in principle and discriminatory in effect. I address myself now to the consequences of the imposition of copyright payments which this industry simply cannot afford to pay on its growth, development, and yes, its survival. Let me capsulize the difficulties of cable television operations today.

Of course, like all other business, we are plagued with increased costs incident to the inflationary period in which we are living. Substantial basic costs like pole attachment fees currently are being increased from 40 to 70 percent across the Nation.

FCC technical standards will require great expenditures in system rebuilding in the next several years with correspondingly increased operating costs. Compulsory cablecasting is still a requirement for systems over 3,500 and operating costs for even a modest operation run into tens of thousands of dollars annually.

As against this spiraling of costs, there is a definite and absolute limit in the possibilities for service charge increases, either because approval cannot be secured from the muncipality or other franchising authority, or because the market conditions will not support the increases, or for both reasons. At the same time, there are converging interests by State and local governmental units seeking control, restraints, and services, sometimes duplicative, sometimes inconsistent, all exacting upon the total resources of the cable industry.

Added to these problems of existing systems, new systems have the added burdens of the staggering costs and special difficulties of system construction and operation in the large and metropolitan city areas, and the feasibility and acceptance of CATV service in such areas are yet to be established.

The experiences to date in the New York City and Akron, Ohio, systems are instructive on the vicissitudes and hazards of such ventures.

Senator McCLELLAN. We note that your time has expired.

Do you want to place the rest of your statement in the record?

Mr. BARCO. I would.

Senator McCLELLAN. We probably ran over a little with the others, so I will give you 3 or 4 minutes, and then you can place the rest of it in the record.

Mr. BARCO. I would want to say, Senator, if I may, please, that there are several specific recommendations which we would like to make, and if you will allow me.

Senator McCLELLAN. What?

Mr. BARCO. There are several specific recommendations we would like to make, if you will permit me to do that. We will place the rest of my paper in the record.

Senator McCLELLAN. All right. Let the rest of the paper be placed in the record.

We are going to run out of time pretty soon. I'll give you time to make the specific recommendations right quick.

Mr. BARCO. First of all, sir, I believe that compulsory license should extend to the reception service of all signals received off the air. In addition to the basic facts and principles which support this treatment, noted earlier, it should be observed that copyright owners utilize the great public resource of the radio and television spectrum without charge. If the copyright owners choose to make use of the tremendous capability of this resource for mass dissemination of their products, with corresponding increased coverage and return, it is wholly unreasonable and unjustifiable for them to insist on all the benefits of broadcasting and yet maintain the same control as if they had provided their own contained arena or exhibition hall.

I would also like to make one other point and then I think I will terminate. In all of these dealings, gentlemen, up to now, there has never been afforded to the viewing public an opportunity to be heard on this matter.

And I submit to you that with the growing concern that there is on the part of the Members of our Congress, and all governmental units, to protect the consumer's rights, this is a matter of real concern. That is why we believe this is a matter that must be decided by the Congress, rather than with the copyright owners, with whom we have not been able to reach any accommodation.

Senator McCLELLAN. Let me ask you one or two questions with respect to the cable TV systems. Do they have to get a franchise to operate in a city or a given area?

Mr. BARCO. Yes, sir.

Senator McCLELLAN. Does that franchise fix or limit the fees you can charge, the service fees?

Mr. Barco. In most every case, it does, sir.

Senator McClellan. In other words, can you pass onto the subscriber, any increase, if you pay for a copyright? Or do you have to pass it on within that franchise limitation?

Mr. Barco. It would be our hope, Senator McClellan, that the fees would not be more than 1 to 2 percent.

Senator McClellan. I mean do you have to pass it on whatever it is?

Mr. Barco. I'm coming to that point. It would be not more than 1 or 2 percent of the income realized for television reception service payment. We believe that the industry can accommodate itself and absorb it.

But if it is more than that, we would necessarily be forced to pass it on. And by way of illustration of the problem that we get into, if we were to meet these demands that are made on us, let me tell you that there are 11 different municipalities in Pennsylvania that absolutely refused to allow any increase of rates in the past year, even though these companies showed they were operating at a loss.

This is the fact of life with which we have to live.

Senator McClellan. Do we have from anybody here the total number of subscribers to CATV systems in the Nation? Do we have that total number?

Mr. Foster. It is estimated at the present time between 7 and 7½ million.

Senator McClellan. Between what?

Mr. Foster. Between 7¼ and 7½ million subscribers across the country.

Senator McClellan. Now, what percentage of those are in the 100 percent markets, and what percentage are in the lesser markets; the 100 category and the lesser category?

Mr. Foster. I would estimate that of the 7½ million, about a million are within the top 100 television markets today.

Senator McClellan. All right.

I want to ask one question of Mr. Mitchell. You pointed out in your statement you have, in addition, analyzed the probable effects of a fee schedule exactly one-half of that in S. 1361, and you point out what that would be.

Dr. Mitchell. Yes, sir.

Senator McClellan. You have also testified concerning the 16.5 percent copyright figure. A copyright payment is the amount, I understand, that the copyright owners have suggested.

Dr. Mitchell. I understand that was an early proposal on the negotiations, sir.

Senator McClellan. Is that a copyright owner suggestion?

Mr. Mitchell. I don't know what it is now.

Well, let me ask you this—analyze it on the basis from 2 to 10 percent instead of 1 to 5. I would like to see what that will do. If you have it, you may do that and submit it for the record and anyone else may submit some figures on that line. I would like to see those.

The issue here is what can the industry stand and still operate at a profit and provide the services. Personally, I would like to see a fair compensation paid to the copyright owner, and I think that we need to take into account the fact that they have already gotten a copyright fee from the broadcaster. And what the service does, it adds on to the value of what the broadcaster sells him.

But I still think, I still think there should be some consideration, some remuneration paid by CATV because they profit out of it, too. There is an equity here, a balance of equities that we should be able to find.

Very well, Senator Burdick?

Senator **Burdick**. Thank you, Mr. Chairman.

Senator **McClellan**. I understand we are going to have a vote, that's why I was trying to hurry along.

Senator **Burdick**. I will be very short. I only have two or three questions. But my first question will be to Mr. Foster.

Section 111(d) sub(2) attempts to establish a rate schedule to be paid copyright owners for the use of their copyrighted material by CATV. Assuming that's desirable, then we are confronted with a real question.

You have testified that you have used the best brains you could find. You used economists. You used a lot of talent, the parties did, trying to arrive at a fair figure.

And you concluded by saying, you are leaving it to the Senate's wisdom. Well, I have got to have more than wisdom. I have to have some basis for this. I am not divine.

Isn't there something the parties can do to give us some basis to publish that?

Mr. **Foster**. Well, we feel we have provided the testimony from Dr. Mitchell, who is here today. He indicates that the fee schedule that's in S. 1361 will provide marginal profitability for cable television systems. And even a schedule of half that much would encourage some probability, but not a great deal.

Senator **Burdick**. Well, I think it is extremely important that we fix something that is reasonable to start with, for this reason. Under the act, we find described in the function of the tribunal, quoting the subdivision of this chapter, that the purpose of the tribunal shall be one to make determinations concerning the adjustment of the copyright royalty rates specified by sections 111, 114, 115, and 116; and to assure that such rates continue to be reasonable.

So, one of the duties of the tribunal is to see that reasonable rates stay reasonable, and I am just wondering if there isn't something more that the contending parties might give this committee to arrive at that reasonable rate now.

Mr. **Barco**. Senator, may I offer a suggestion? The Canadian CATV Association made a study of over 1,000 systems that they have up there, and they have some very large systems—incidentally, larger than any that we have had in this country here. And their studies show that the net return for all of the systems is under 5 percent on the investment involved. The penetration, Senator, is much higher than it is in our country here.

Mr. **Foster**. Senator, let me answer that by saying if I felt that 2 weeks of testimony before this committee would produce factual data that would support one fee schedule against another any better than we have supported from Dr. Mitchell's testimony, I would be glad to provide that date. But I just don't believe that it is there.

And therefore, I think we have to accept some degree of arbitrariness with this initial fee schedule. We would like to get on with the task of paying these copyright fees. I know that it must sound a little bit ludicrous for somebody to want to hurry up and start paying fees, but as you know, we get called pirates and thieves and parasites in lots of different places. We would like to clear the air on this and get a fee schedule going and get some experience with it.

Senator Burdick. I understand, Mr. Foster, that you are asking us to find a fair fee that private citizen A pays private citizen B without factual basis.

Mr. Foster. I feel that there is enough basis in the material that we have presented that indicates that there is support for a fee schedule of one-half the schedule that is in the bill. We have supported the fee schedule in the bill, because quite frankly we felt that that bill, in its present form, with some minor amendments, has a good chance of getting passed. We can then get beyond this copyright issue and move on to the other very vexing regulatory problems that we have.

Senator Burdick. Well, let me try this one. Suppose this subcommittee decided after these hearings that we should rewrite section 111 to conform in all respects to the consensus agreement reached among the respective parties, including your association, in November 1971.

Would your association have any objection if we decided we would extend the compulsory license only to CATV retransmission of local TV stations and such distant TV stations as are permissible under the FCC 1972 rules, so that any cable retransmission going beyond the level of signals would be subject to normal copyright law liability.

Mr. Foster. Well, we feel that way that that problem is handled in the bill as it now stands is most appropriate. To answer the first part as to rewriting this bill in the light of the consensus agreement, I think I might be able to answer the question a little bit differently if we could adjust all of the rest of the regulatory world to also conform with the consensus agreement if, for example, the FCC would change its rules on nonduplication in the Rocky Mountain time zone, in which it has not conformed to the consensus agreement.

In other words, we regard the consensus agreement as a document that got the parties off center as far as getting some new rules in place. Already the new rules have been changed in some respects. There have been complications in the rules—and the FCC has indicated that they are going to have to correct them—and we have moved on from the consensus agreement.

But on the issue of copyright, we have always felt that the undergirding intent of the agreement was to get early passage of copyright legislation, and that is what we have been about. We have been working pretty hard to get S. 1361 going, because we feel that is our responsibility

Senator Burdick. You were in agreement with the consensus agreement at that time?

Mr. Foster. Yes, indeed. We were a signatory to the agreement.

Senator Burdick. Suppose this committee also decided that since the parties have not reached an agreement on the amount of fees, the matter should be resolved by the arbitration tribunal, as contemplated by the consensus, and use the fees of the consensus in the meantime.

Mr. **Foster.** There are no fees provided in the consensus agreement. The only fee schedule that I know of is provided in S. 1361.

Senator **Burdick.** The consensus provides arbitration?

Mr. **Foster.** Yes; the consensus agreement mentions compulsory arbitration.

Senator **Burdick.** Suppose we decide the question along those lines, what would be your view?

Mr. **Foster.** I believe that S. 1361 involves the concept of arbitration, except that it puts it at the time when I believe we'll have more meaningful evidence, after the passage of the bill. At that point in time, we will have arbitration.

Senator **Burdick.** But you want us to decide right now, to deceide in the meantime what those fees should be.

Mr. **Foster.** We would like you to do that, yes, sir, because I feel that the parties have negotiated with very good intent and all sorts of expertise and they haven't come up with an agreeable fee schedule.

Senator **Burdick.** Well, I am looking for wisdom that you asked us to use, to do our best.

Mr. **Foster.** Thank you, Senator. I'm sure you will.

Senator **Burdick.** I've got two other questions. Would you describe the need for an exemption from copyright liability of CATV systems with 3,500 or less subscribers?

Mr. **Foster.** Yes, sir. We feel that these small systems outside the major markets should be given an across-the-board exemption. They have many administrative problems. In those systems already they have endless forms to fill out and file with the FCC. Now, we're just going to put one more burden on them, not only an economic burden, but an administrative burden.

The small systems just do not have the economies of scale built into them that the large systems do. They still have to maintain an office and all of those kinds of things. We just feel that this is an unnecessary burden for a very, very small rate of return to the copyright owner.

And I should mention that not all of our member systems support that move for exemption. Mr. Barco among others does not believe that exemption appropriate.

Senator **Burdick.** We have a vote, but I would like to ask this question. If we haven't time to answer it, would you supply the answer for me?

Mr. **Foster.** Yes, sir.

Senator **Burdick.** We continue to speak in terms of percentage of gross revenue. Can you estimate under the section 111 fee schedule how much the San Diego, Calif., and the New York City CATV systems would presently pay; and when the systems mature, what would they expect to pay?

And second, what is the gross revenues of these systems; would you supply that to the committee?

Mr. **Foster.** Yes, sir. I will supply that, and I would so supply that not only on the basis of the fee schedule that is in S. 1361 but also on some alternate fee schedules, so that we can see the relative impact on those large city systems.

Senator **Burdick.** Sorry we have to vote.

Senator **McClellan.** Thank you very much.

We will recess until 2 o'clock.

[Whereupon, at 12:08 p.m., the subcommittee recessed, to reconvene at 2 o'clock later the same day.]

[The prepared statements of Mr. Foster, Dr. Mitchell, and Mr. Barco follow:]

STATEMENT OF DAVID H. FOSTER, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION, INC.

My name is David Foster. I am president of the National Cable Television Association, Inc., with offices at 918 16th Street, NW., Washington, D.C. 20006. The National Cable Television Association—known sometimes as NCTA—is a national trade association representing a majority of the cable television systems in the United States of America, and is vitally interested in matters affecting CATV.

Let me say at the outset that NCTA is in favor of omnibus statutory copyright revision which includes provision for the imposition of reasonable copyright responsibilities on CATV. NCTA is in favor of the passage of S. 1361. However, because of the evolving technology of CATV, and the business and regulatory atmosphere within which it must operate, we respectfully have several comments and suggestions for your consideration. We thank you for the opportunity to appear before this subcommittee and to assist you in your deliberations.

Perhaps, for the record, it would be well to explain just what a cable television, or community antenna television, or CATV, system is. The Federal Communications Commission (FCC), at 47 C.F.R. § 76.5(a) defines a CATV system as:

> Any facility that, in whole or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that services fewer than 50 subscribers, or (2) any such facility that serves only the residents of one or more apartment dwellings under common ownership, control or management, and commercial establishments located on the premises of such an apartment house.

Generally, the CATV system is composed of "hardware" which includes a tower on which are placed receiving antennas strategically placed to receive broadcast television signals where their strength is greatest. Usually, at the base of the tower, a technical facility is constructed to feed the television signals into amplification equipment and the cable network; this facility is known as the "head-end". The cable network is composed of trunk lines, distribution or feeder lines, and the customer taps. These lines, constructed of coaxial cable, may be buried underground or attached to telephone and utility poles in accordance with pole-line or pole-attachment contracts. In order to maintain the strength of the signal at uniform levels throughout the cable network, repeater amplifiers are placed at intervals along the trunk and distribution line. Thus, the subscriber at the end of the line of the CATV system is able to receive as good a picture as the subscriber nearest to the head-end. The trunk line is the torso, the distribution lines the arms, and the customer taps are the fingers of the systems. It is at the viewer's television receiver that the CATV system has both its beginning and its ending, for the service provided by the CATV system comes into the home *only* when the viewer activates his receiver.

Over this hardware is distributed the "software" which is composed of broadcast television signals in all systems, of non-broadcast television signals in some systems, and of non-entertainment signals in a very few systems. The diversity of the software shows both the extent of the evolution of the CATV industry and its promise for the future *if the evolution is not retarded.* This is a traditional CATV system. It receives a signal from a central point and distributes it to multiple points.

At this stage of the Subcommittee's deliberations, it is also important that the Committee know that CATV and Pay-TV (or STV as the FCC calls it) are not the same. A nominal fee is paid for the reception and distribution system comprising the CATV system, but the subscriber is not paying for specific programs as he would under a Pay-TV basis. The distinction is made clearer when you consider that pay television is a system whereby the signal is *broadcast* in scrambled form to be decoded by some device at the receiver so that the signal becomes unscrambled and clear. But CATV does not use the broadcast spectrum.

It uses cable for the purpose of distributing the signal to the receivers. Pay-TV has separate encoded programs for which they make individual charges; CATV picks up free programs and redistributes those. The FCC and representatives of the broadcasting and CATV industries have recognized the fundamental differences between Pay-TV and CATV.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the United States Supreme Court established that CATV systems were interstate operations, properly to be regulated by the Federal Communications Commission. The Court stated, at pages 168–169:

> Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intra-state would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." (Citation and footnote omitted.)

Subsequently, detailed regulations of the FCC were upheld in *Black Hills Video Corp v. States*, 399 F.2d 65 (8 Cir., 1968).

CATV systems are governed by comprehensive regulations of the Federal Communications Commission (See, 47 C.F.R. 76.1 *et seq.*). The Commission's regulatory scheme varies, depending on the location of a community within which a CATV system operates, as that community is related to communities designated by the Commission as a "television market." The regulations further distinguish between "major" television markets (which are divided into "Top-50" and "Second-50" markets) and "smaller" television markets.

The major television markets in the country, definded by 35 mile circles around a central point in each market, contain about 85 percent of the population of the United States. This large area has only recently been opened to development by cable television.

Early federal regulations attempted to establish some kind of a formative direction for cable television as it existed then. In the more than seven years that have followed, the Federal Communications Commission has adjusted its regulatory program to reflect changes in the cable television technology. So, when we talk about the regulatory atmosphere within which cable television now must operate, there are essentially four different areas.

First, there is the area regarding the delivery of the signals which are received off the air. Then there is the delivery of the nonbroadcast signals. Then there are technical standards imposed upon the industry. And, lastly, there is an attempt to resolve the very difficult problem of the relationship between Federal, State, and Local regulatory jurisdictions.

I will not be able to cover the details of federal regulation, but with your permission, I will paint the picture with a rather broad brush. If you should have detailed questions, I will be glad to submit a supplementary statement.

The number of television broadcast signals that cable TV systems are allowed to carry is determined by their geographic location. If they are in one of the 50 largest markets in the country, they are entitled to carry three full network stations, three independent stations and an unlimited number of "unobjected to" educational television stations as well as an unlimited number of non-English language broadcast stations. When I say "unobjected to" educational television stations, what I mean is that the local educational television station has the opportunity to object to the importation of distant educational television stations; if it does not object, then the cable television operator in a given community can import an unlimited number, provided he can get the microwave frequencies to do so.

In markets 51 to 100 the signal complement is three networks, two independents, again, an unlimited number of unobjected to ETV's, and an unlimited number of non-English language broadcast stations. In addition, in the 100 largest markets, the cable operator, under the new rules, is entitled to import two additional signals, from a distant market, usually independent television stations, which we call two "wild-card" signals. In the small markets, 101 down to about 228, the complement is one independent, three networks, unlimited "unobjected-to" educational television stations, and an unlimited number of non-English language broadcast stations. In small markets, there is no provision for the importation of two "wild-card" signals.

This means that the cable television operator who faces entry into any locality must measure the available signals off-the-air, fit them to this complement, which the FCC allows him to carry, and then see if he can find an attractive combination which will allow him to market his service.

As a limitation on what the CATV operator can do with those signals, the FCC has incorporated a copyright concept: the concept of program exclusivity. That means if a local television station is broadcasting "I Love Lucy" at 6:00 at night and a station which a CATV operator is importing from a distant market also broadcasts "I Love Lucy" at the same time period, then "I Love Lucy" on the distant, or imported, signal must be blacked out, so that the viewers cannot see "I Love Lucy" on the distant channel. Viewers are forced to turn to their local channel if they want to watch "I Love Lucy". That is the effect of nonduplication, or copyright exclusivity, written into federal regulations.

There are two types of exclusivity which the FCC has imposed on cable television. One is for network programs. There the time period is simultaneous. This means that a network show, "Dean Martin", being broadcast at 9:00 locally and the distant station also broadcasts "Dean Martin" at 9:00, then "Dean Martin" on the distant station must be blacked out.

In addition, there is a very complicated system of non-network exclusivity: What the Commission calls "syndicated exclusivity". It breaks down programs into essentially five categories—off-network series, first-run series, first-run nonseries, feature films, and "other programs" which are really off-network specials. When I say "off-network special" that means that a special has had exhibition on a television broadcast network sometime in the past. The time period is not "simultaneous" in these cases: it varies from one to two years. In some cases, CATV can carry a program broadcast on a distant station one day after it's broadcast on a local station, but exclusion lasts no longer than one year from the first market purchase or non-network broadcast in the local market. This system is a very complicated control of what the CATV operator has to do with respect to "blacking out" signals from distant stations, and are limitations on the use of programs on the distant signals.

In addition, the FCC has moved into the new area of delivery on nonbroadcast signals—the cablecasting or narrow-casting of channels.

New systems in a major television market must also have a certain minimum channel capacity. That channel capacity, as it breaks down into layman's language is 20 channels—twenty 6 MHz channels (a 6 MHz channel is a television channel). It must also provide for equivalent bandwidth so that if it receives off-the-air at its head-end antenna and delivers 12 television signals, it must have a system capacity of 24 channels. So, for each off-the-air television channel delivered the system must also have the capacity of providing one other channel for nonbroadcast purposes. The use of those channels is for the primary purpose of delivery of non-decoded, nonbroadcast signals; or, for the use of nonbroadcast decoded signals; that is, pay TV by wire. The new rules also provide that all new systems in the major markets must have two-way capacity for nonvoice return signals.

The federal regulations also provide that all the new CATV systems have to provide room for access channels. Access channels are divided into essentially four categories. First, there is a public access channel, which must be available for anyone to come in off the street and say his piece. That channel must be nondiscriminatory, it must be noncommercial, it may not make any charges at all except for live production costs of over five minutes in the studio. In addition, the CATV system is required to have the minimal equipment and facilities necessary so that the public can use this channel. Second, federal regulations require provision of an educational television access channel, which must be provided by the CATV system free for the first five years after the completion of the system's trunk line cable. The purpose of the free five-year period, according to the FCC's reports, is to encourage the innovative use of educational television on cable systems. Third, there is a requirement that new systems must have a "government" channel which also must be free for five years after the completion of the trunk line. Fourth, there is the requirement that cable systems must have at least one "leased" channel available for any purpose at all, on either an hourly basis or on a total channel leased basis. There is one other feature of this access channel proposal: The delivery of nonbroadcast signals. That is the requirement imposed by the federal government for an expansion of that access channel capability, provided that on 80 percent of the weekdays (Monday through Friday) the channels are used for 80 percent of any three hour period in that time, for six weeks running. The CATV system has six months within which to provide an additional channel for these uses. If that access user can supply the product to fill that channel he can then spill over into these other channels until 80 percent of the time in any three-hour period for 80 percent of the weekdays is filled; then he is entitled to still another channel, and that will go on and on as the demand increases.

There are operating rules which the FCC has provided for these channels. For example, on the ETV channel, there can be no commercial advertising, there can be no lottery information, there can be no indecent or obscene material, and records of the use of these educational channels must be kept by the cable system operator for at least two years.

There is one other area that I think might be of interest to you. There are franchise standards adopted by the FCC in their concern about the proper relationship between the local and the federal governments. Every new franchise must weigh, in a full public hearing, the applicants' qualifications, as to their legal competency, their character, financial capability, and technical capacity. The franchise must require that there be significant construction of a CATV system within one year, and the FCC says that they think about 20 percent per year is reasonable. There must be an equitable and reasonable extension of the trunk line in every succeeding year until every person in the community is capable of being served, and the CATV system must reach a substantial percentage of its franchise area. The FCC also provides that all new franchises must be of fifteen year duration. There must be approval by the city fathers of an initial subscriber rate, and approval of requests for increases in that rate, including the installation rates and the subscriber rates. There also must be in every new franchise a procedure for the investigation and resolution of complaints and there must be maintenance of a local business office or agent by the CATV system in the community for that purpose.

CATV systems operating as of March 31, 1972, are grandfathered, that is they do not have to comply with these regulations until March 31 of 1977, or until the end of their franchise period if it is earlier than that date.

In addition, the regulations also contain the following rule, found at 47 C.F.R. § 76.7(a):

> On petition by a cable television system, a franchising authority, an applicant, permittee, or licensee, of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, *impose additional or different requirements*, or issue a ruling on a complaint or disputed question. (Emphasis added.)

Thus, the extent of the FCC's regulatory power over CATV system operations appears virtually unlimited except by constitutional protections.

NCTA believes that many of these regulations are for the protection of television broadcasters and copyright proprietors and do not benefit CATV or the public interest. The CATV industry has learned to live with most of them, however, and they should be useful in your deliberations, as we will show later.

Despite the regulatory restrictions on CATV, the industry has grown because it provides the additional time and program diversity that the public wants. There are approximately 2,900 cable systems in the United States. There are about 151 systems, having less than fifty subscribers, for which no subscriber data is available. But for 2,749 systems, we find informative the data on cable systems by numbers of subscribers served: 836 systems are in the 50–499 subscriber category; 524 systems are in the 500–999 subscriber category; 502 systems are in the 1000–1999 subscriber category; 404 systems are in the 2000–3499 subscriber category; 163 systems are in the 3500–4999 subscriber category; 215 systems are in the 5000–9999 subscriber category; 83 systems are in the 10000–19999 subscriber category; and 22 systems have over 20,000 subscribers. We hasten to point out that these data are approximations, since even the Federal Communications Commission with over seven and one-half years of regulatory experience has had difficulty in assembling usable, accurate data. Incidently, this is one reason why NCTA favors the creation of a Copyright Royalty Tribunal, to assemble and weigh information gathered to assist in the periodic adjustment of statutory royalty fees for CATV.

As NCTA reviewed the prospects for changing the existing copyright statues in order to impose copyright liability on CATV systems, it was apparent to us that certain basic factors must be considered. Those factors can be summarized as follows. The basic CATV system merely provides its subscribers with a service for improving television reception. Copyright control would discriminate between those television viewers who need no special equipment and those who do, and between those television viewers who erect their own antennas (sophisticated or simple) and those who choose to utilize the CATV service. Further, the CATV operator has no control over the content of the programs its subscribers receive and does not know what copyrighted works will be included in any given program—nor does he know who the copyright owner is. Unless a statutory compulsory license is granted, clearance plans or blanket licenses would not prevent certain copyright owners or licensees from charging exorbitant fees and thus gaining control over the much smaller CATV industry. Moreover, the royalties now being paid by broadcasters to copyright owners are based, generally, on the size of the audience reached—including CATV subscribers. Copyright owners and broadcasters are thus benefitted, at CATV's sole expense, by expanding the audience and therefore the revenue, and additional royalty payments by CATV represents windfall gain. On the other hand, duplicating programs, subject to regulatory requirements, are required to be blacked out thus protecting the copyright owner/broadcaster market, but subjecting CATV to conflicting requirements if S. 1361 (as introduced) were enacted. Without some changes in the Bill, CATV operators would be forced to choose between violating the copyright law, violating the regulations of the Federal Communications Commission, paying copyright owners and broadcasters whatever they asked to avoid litigation, or going out of business.

With that background in mind, we turn to the context of copyright law revision itself. The history of copyright law revision is revealing. The first copyright law of the United States was enacted in 1790, by the First Congress, as an exercise of the constitutional power to promote progress of science and arts by securing to authors and inventors the exclusive right to their products for a limited time. (U.S. Constitution, Article I, Section 8). Comprehensive revisions of the copyright law were enacted in 1831, 1870 and in 1909. The 1909 copyright revision is, basically, the present copyright law. Numerous attempts at partial copyright law revisions failed over the years but, after World War II, the United States cooperated in the development of the Universal Copyright Convention, and became a party to that Convention in 1955. That same year, pressured mounted for a general revision of the U.S. copyright law. The Copyright Office conducted studies which resulted in the 1961 study entitled "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law." In 1964, H.R. 11947 was introduced, but died at the end of the 88th Congress. In 1965, H.R. 4347 was introduced; it too died. In 1967, H.R. 2512 and S. 597 were introduced, both of which contained Section 111 which treated CATV. H.R. 2512 passed the House and was referred to the Senate after Section 111 was stricken from the bill, H.R. 2512 and S. 597 both died at the end of the 90th Congress. S. 597 was reintroduced as S. 543 in the 91st Congress and was amended to form S. 644 which died at the end of the 92nd Congress. S. 644 was reintroduced as S. 1361 in the 93rd Congress.

Section 111 of the Bill, dealing with cable television remains the same as it was in S. 644. As we understand S. 1361, TV and radio stations generally are treated as primary transmissions and cable television systems generally are treated as secondary transmissions.

The bill contains numerous sections which affect CATV. As examples, Section 101 defines "Audiovisual Works", "display", "perform", "publicly" and "transmit"; Section 106 relates to exclusive rights in copyrighted works; Chapter 5 relates to infringement and remedies; and Sections 801 and 807 relate to a copyright royalty tribunal; as well as Section 111, relating to secondary transmissions. All are key parts of the Bill affecting cable television.

All commercial cable television systems would be required to pay copyright royalties based on *gross receipts* from subscribers to the basic reception service.

Every three months cable television systems would have to file with the Copyright Office a report identifying the system, the signals carried, the number of subscribers, and gross receipts from the basic reception service. Based on the information in those reports, systems would pay royalties quarterly by the following schedule:

One percent of gross quarterly receipts of up to $40,000.
Two percent of gross quarterly receipts of $40,000 to $80,000.
Three percent of gross quarterly receipts of $80,000 to $120,000.
Four percent of gross quarterly receipts of $120,000 to $160,000.
Five percent of gross quarterly receipts of over $160,000.

The royalties would cover payments for "grandfathered" signals, local signals (Grade B), said signals provided under the Bill's adequate-service, statutory license scheme. For each signal authorized by the FCC, in addition to those provided to achieve more adequate service, a surcharge of 1% would be added. Systems outside of any television markets (market is defined as a predicated Grade B signal contour of a TV station) would have a statutory license to receive any broadcast signals.

"Adequate service" is split at market number 50. For markets 1–50, adequate service is all network television stations, three independent stations, and one ETV; in markets 51 and smaller, adequate service is all networks, two independents and one ETV. Construction permits are not included in the complement. No "leapfrogging" would be permitted unless a waiver was obtained from the FCC.

Where the center of the cable system is within 35 miles of a top-50 television market, run-of-the-contract exclusivity protection for "syndicated" programs must be given to local stations against distant stations. Where the center of the cable system is within 35 miles of a non-top 50 television market, protection of "syndicated" programs must be given only if the program had never been broadcast in that market. Where programs were blacked out, the FCC could authorize signals to enable the substitution of a non-protected program.

The Bill also provides for a sports "blackout" of organized professional team sports event unless a *local* station is transmitting the sports program.

The Bill contains a mechanism for adjusting royalty fees every five years. A copyright proprietor or user could request a Copyright Royalty Tribunal to adjust fees, which fees if adjusted would be referred to the Congress. If, within 90 days, the House or Senate does not rescind the fees, the new schedule would go into effect 91 days after the first 90-day period.

Hotel or apartment house MATV's distributing local signals without direct charge; instructional closed circuit systems; common, contract, or special carriers not controlling program content; and, government owned or nonprofit CATVs would be exempt from royalty payments.

The statutory license could be lost if the system failed to file the appropriate reports with the Copyright Office or if the system did not observe the exclusivity provisions, or if the system did not observe the sports "blackout."

Certain definitions are left for annual review by the FCC, based upon criteria in the Bill, and the FCC is permitted to regulate cable television systems in any matter not inconsistent with the Bill's provisions.

The Bill also provides for remedies for copyright infringement, including injunctions, impounding and destroying copies (tapes or films, etc.), suits for actual damages, suits for statutory damages (from $100 to $50,000 per infringement depending on the circumstances), and criminal penalties ranging from $2,500 to $10,000 in fines and one year's imprisonment for each offense.

The source of copyright protection is to promote the progress of the arts and sciences by giving authors and inventors an exclusive right to the products of their creativity for a limited period of time (U.S. Constitution, Article I, Section 8). Copyright protection has a twofold purpose: To encourage literary creativity and *to promote dissemination of knowledge to the public.* Traditionally, more importance is attached to the latter purpose. (*Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

As was pointed out in the legislative history of H.R. 2222, 60th Congress, 2nd Session, in 1909, it is necessary to strike a balance between encouraging creativity through a limited monopoly and the ultimate, paramount interest of the public in unrestricted freedom to use the works of others after the authors have harvested their rewards. Thus copyright legislation is not primarily for the benefit of the owner of a work, but is for the benefit of the public.

Through the reception and distribution of television broadcast signals, CATV promotes the dissemination of knowledge to the public. But the reception and distribution of television broadcast signals has brought several legal issues into focus. One of the first concepts to emerge was that CATV systems were engaged in "unfair competition" when they carried programs without permission or payment. This theory was judicially tested in the United States District Court for Idaho, *KUTV, Inc. v. Cable Vision, Inc.*, 211 F. Supp. 47 (D. Idaho, 1962). That Court held that when a CATV system carried programs from a distant television station into a community where a local television station had an exclusive contractual right granted by the program owner to broadcast the programs locally, the CATV system was engaged in "unfair competition." This decision was reversed by the United States Court of Appeals for the Ninth Circuit, which held that the only judicially protectable rights, if any, in programs were the copyrights. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9 Cir., 1964).

Meanwhile, in 1960, a group of owners of copyrighted motion pictures decided to litigate their claim to copyright royalties for CATV carriage. A suit was accordingly instituted in the United States District Court for the Southern District of New York against two CATV systems. Initially, the District Court decided in favor of the copyright owners. *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (S.D.N.Y., 1966). This result was sustained by the United States Court of Appeals for the Second Circuit, *Fortnightly Corp. v. United Artists Television, Inc.*, 377 F. 2d 872 (2 Cir., 1967). However, the Supreme Court reversed this decision, holding that CATV's reception and distribution of television broadcast signals carrying copyrighted programs to subscribers does not constitute a "performance" needed for a violation of the Copyright Act. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). The Court stated that CATV systems were more in the nature of the passive receivers, like a rooftop antenna, than active performers.

The next chapter of this history began in 1964 when the Columbia Broadcasting System sued TelePrompTer Corporation, also in the United States District Court for the Southern District of New York. That suit was held in abeyance until after the Supreme Court's decision in *Fortnightly*. CBS has tried to distinguish the facts in *Fortnightly* by claiming that a CATV system becomes an active performer when it imports distant television signals, uses microwave to obtain signals, interconnects with other CATV systems, originates its own programs, or sells advertising. The District Court rejected all of these contentions, holding instead that *Fortnightly* was dispositive of the issue. *Columbia Broadcasting System v. TelePrompTer Corp.*, 335 F. Supp. 618 (S.D.N.Y., 1972). This result was reversed in part by the United States Court of Appeals for the Second Circuit. *Columbia Broadcasting System v. TelePrompTer Corp.*, 476 F. 2d 338 (2 Cir., 1973). That Court held that where a CATV system was carrying a "distant" television signal, such carriage stepped over the line of passive reception to become a "performance." The test for a "distant" signal was stated in the negative, i.e., a signal is "local" if it can be received in or near the CATV community. The lower court was sustained in all other respects. Both parties have asked the Supreme Court to review the Second Circuit's decision. Should this decision stand, several other issues remain to be litigated, *e.g.*, specific application of "distant" signal test, validity of program copyrights and extent of damages.

There is yet another factor which has been raised before this Subcommittee for its consideration in fashioning copyright revision legislation: The so-called "Consensus Agreement" or "OTP Compromise."

For your convenience, the copyright provisions of the OTP Compromise follow:

> A. All parties would agree to support separate CATV copyright legislation as described below, and to seek its early passage.
>
> B. Liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3500 subscribers. As against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the Commission may allow.
>
> C. Compulosry licenses would be granted for all local signals as defined by the FCC, and additionally for those distant signals defined and authorized under the FCC's initial package and those signals grandfathered when the initial package goes into effect. The FCC would retain the power to authorize additional distant signals for CATV carriage; there would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings.
>
> D. Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.
>
> E. Broadcasters, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

Let me hasten to add that the Congress was not a party to this so-called compromise, nor to our knowledge was it consulted with, nor is it bound by the terms, in any way.

Let me also point out that the Federal Communications Commission did not adopt rules which comported in all respects with that "compromise." Notably, at the urging of television broadcasters in the Rocky Mountain region, a very important part of the Compromise (relating to network exclusivity) was sabotaged before the final Federal Communications Commission rules were adopted. Furthermore, Broadcasting magazine, in its February 14, 1972, issue reported that the licensee of KVVU-TV, Las Vegas, Nevada, had sought court review of the FCC's new rules with an eye toward obtaining their reversal. In addition, major broadcast elements, *i.e.*, CBS, did not support the "compromise."

It should also be pointed out that the FCC's position on legislation, announced in a letter from Chairman Dean Burch to Senator John O. Pastore, dated March 11, 1970, and to the best of our knowledge still in effect today, is as follows:

> "For example, the concept of 'adequate television service' in S. 543, defined as precisely as it is, or the use of fixed mileage concepts like the 35-mile zone for program exclusivity, or the inflexible FCC non-duplication requirement specified, may not be legislatively sound, even recognizing that in some respects there is some authority given the agency to make future revisions. The approach which has been taken in the Communications Act seems preferable to us—namely, the Congressional determination of general guidelines, with the Commission left to develop and, most important, revise detailed policies to implement those guidelines in the light of rapidly changing communications technologies, and with Congress overseeing such Commission activities, particularly through the legislative hearing process.
>
> * * * * * * *
>
> "We therefore believe that clarifying legislation in this field should set forth general guidelines and eschew detail. This approach, we believe, may also be employed as to any copyright legislation dealing with CATV. Such legislation can be broadly framed—for example, the Congress could adopt a provision that a CATV system shall have a compulsory license for such signals as the Commission, by rule or order, may authorize the system to carry. The copyright law could then specify the appropriate amount to be paid, or method of determining the amount, a method for distributing the funds thus paid in (e.g., a so-called "ASCAP-BMI" method), a provision for periodic adjustments in the amounts to be paid, and any exemption for existing small systems deemed desirable."

With the benefit of observing the various threads just mentioned, we can turn to the fabric of copyright revision affecting CATV. I must point out, that because of the complexity of the subject matter, it is most difficult to achieve unanimous agreement on the approach to be followed. In this hearing however, I will present NCTA's positions and the rationale for them.

The single most vexious issue is that of establishing a fair schedule of royalty fees to be paid by CATV systems in return for receiving the statutory copyright license.

Over the past five years the CATV industry has supported legislation imposing copyright liability on CATV systems for the carriage of off-the-air broadcast signals. NCTA committed itself to seeking passage of fair and reasonable copyright legislation. With respect to the payment of royalty fees, NCTA offers the following comments on various aspects of Section 111 of S. 1361.

STATUTORY LICENSE FOR COPYRIGHTED PROGRAMS

Once a copyright holder has permitted the sale of his product for broadcast use, equity dictates that CATV systems should be allowed to receive broadcast signals without alteration provided appropriate payment is made. CATV systems would, therefore, have reasonable access to broadcast programming.

A typical television broadcast station carries over 5,000 programs per year. A typical CATV system carries at least five television stations, and often several radio stations. Thus, it is administratively impossible to negotiate with every copyright owner prior to reception and distribution of programs. A CATV system also has absolutely no way of knowing in advance what programs are protected by copyright since a cable system is a passive reception device.

A practical solution to overcome this problem is legislation granting CATV systems a statutory license. There is ample precedent for compulsory licensing since ASCAP, BMI, and SESAC contractually grant them to networks, local broadcasters and others for all musical works. Subsection (c) of Section 111 provide for a statutory license for programs on all permitted broadcast signals.

The regulatory provisions of subsection (c) are rendered unnecessary by the FCC's 1972 Cable Television Report and Order. NCTA submits that no other limitations on the FCC's authority to authorize further signal carriage should be substituted.

ONE FIXED STATUTORY COPYRIGHT FEE FOR CATV SYSTEMS PAYABLE TO ONE CENTRAL DEPOSITORY

Copyrights are held by thousands of people and ownerships of copyright changes daily. The burden for CATV systems to negotiate price and terms with each copyright owner would be overwhelming. Thus, a fixed fee payable to a single point is essential. Such a fixed schedule gives the copyright owner an additional fee for his product and the broadcaster a strong bargaining point for reduction of his fee. This is provided for in subsection (d) of Section 111. Under other provisions of S. 1361 other interests, such as juke box owners, would also pay a fixed fee to a central point.

ESTABLISHMENT OF A STATUTORY COPYRIGHT TRIBUNAL FOR FUTURE ARBITRATION

To overcome objections to a fixed fee schedule for the life of the statute, Chapter 8 of S. 1361 establishes a copyright royalty tribunal. Three years after the statute is in effect and then every five years thereafter, any interested person can petition for an adjustment in the fees. The tribunal, after hearing evidence of the previous period of experience, would make a recommendation on the proposed adjustments. This will allow a practical market determination of fair rates in years to come, and the CATV industry supports this provision as written.

AN INITIAL FEE SCHEDULE SHOULD BE SET BY CONGRESS

Section 111 provides for a progressive copyright fee schedule of 1 to 5 percent of gross revenues from the basic cable service. Consequently, the larger a CATV system becomes, the greater the percentage of its revenues to be paid as a copyright fee. As pointed out above, S. 1361 provides a mechanism for periodic revision of the fee schedule. The CATV industry supports the Congressional establishment of the initial fee schedule in the legislation along with the provision of compulsory arbitration procedures for future adjustments.

Some parties have suggested altering Section 111 so as to have even the initial fee schedule set by an arbitration tribunal. The CATV industry views this as an erroneous approach for several reasons. First and foremost, sufficient empirical data simply does not presently exist to permit arbitrators to fairly establish an initial fee schedule. Up until quite recently, CATV merely served as a master antenna for smaller and more remote communities in order to improve reception and/or provide program diversity. The financial performance of this traditional CATV operation is well known. However, the gross dollar volume of this portion of the industry is not large and will not increase a great deal. Hopefully the gross revenue that CATV will ultimately attract in the cities will be much larger. The real target for cable is the top 100 television markets. About 85% of the American people live in these markets, and CATV presently serves about 2% of this number. The principal reason for this state of affairs has been the regulatory posture of the Federal Communications Commission. In the mid-1960's, when CATV technology began to permit cable development in the cities, fear of CATV's potential impact on broadcasting led the FCC to enact a series of restrictive regulations culminating in an absolute freeze on new CATV development in the larger markets lasting from December, 1968, to March, 1972. In 1972 the FCC at last opened the door to major market CATV development. But that development is not happening overnight. First, the local franchising process and subsequent FCC approval takes many months. Second, large amounts of money must be found to finance construction. Third, construction takes time even in small communities. And finally, even a constructed system takes a year or two to develop in a market. In other words, the CATV industry still has little evidence on how well it will do in the bigger cities, or whether, in fact, it will do well at all. Such data will not be available in any meaningful quantity for a few years.

What does exist, in great quantity, are projections of CATV's growth in the cities. These projections vary widely from rosy optimism to gloomy pessimism. These are educated guesses at best. Since there are few facts, and much speculation, arbitration at this time would be mere conjecture. The only logical way to proceed is for the Congress to set an initial, moderate set of fees with arbitration after facts have been developed. The Subcommittee's procedure in Section 111 is clearly correct.

AMOUNT OF FEES TO BE PAID

The CATV industry does believe that the fee schedule set forth in Section 111 establishes fees which are too high for most CATV systems. A recent study by Dr. Bridger Mitchell entitled "Cable Television Under the 1972 FCC Rules and Impact of Alternative Copyright Fee Proposals" supports this position (see Attachment A). This study assesses the profitability of CATV in the major markets under the current FCC rules and then gauges the impact of three possible copyright fee schedules. Dr. Mitchell found that the effect of the fee schedule in Section 111 would be to reduce the rate of return on total capital a full percentage point for profitable and near-profitable systems. In all but a few situations this reduction drops the rate of return below the generally accepted necessary 10%. For example, large systems on the edge of large markets will earn a 10–13% rate of return, large systems in middle markets will not earn more than 10%, and intermediate and small systems will be only marginally profitable. Thus a one-point reduction in the rate of return could be devastating. Beyond that, of course, is the fact that a one-point reduction in the rate of return on *total* capital will effect the return on *equity* to an even larger extent because of leverage. This effect is multiplied when the costs of borrowing increase. This could easily result in the postponement or cancellation of the riskier big city cable construction. Thus because of the fairly restrictive nature of the FCC's rules and the marginal viability of big city CATV systems, the investment environment may well be adversely affected by copyright payments at or above those required in Section 111.

Criticism of Dr. Mitchell's study has largely been centered on certain key assumptions related to revenues. These criticisms are generally without substance. For example, Dr. Mitchell assumed a mature penetration figure of between 35 and 40% using a study made by Dr. Rolla Park for the Rand Corporation wherein Dr. Park estimated CATV demand in various markets under the FCC's 1972 rules. Critics say that penetration will be significantly higher. That is possible, but Dr. Park's study is the best estimate available, and it is not inconsistent with other forecasts. Other figures used by Dr. Mitchell can be questioned too, but his overall results are conceded by many observers to be quite valid. The CATV industry hopes that the more optimistic studies will be correct, but if the present thinking proves true, then Section 111's initial fee schedule is too high.

In the May 15, 1973, issue of *Cablecast*, economist and analyst, Paul Kagan, points out:

"Consider the enigma of the motion picture company: friend to the cable operator as a potential box office partner and foe to the cable operator over differences in copyright payments for distant signal importation.

"In its role as foe, the Motion Picture Assn. of American has distributed an economic study to discredit a previous cable industry report that showed how little CATV can afford to pay for copyright.

"Understandably, the MPAA study shows how rich a cable company is, and thus how easy it would be for CATV to meet copyright owner demands for as high as 16% of a cable company's gross.

"We have compiled a list of fallacies in the MPAA study including its disregard of startup deferrals in computing operating costs of a cable system: its equating of merger/acquisition values with projected operating results and its basic conception that cable companies are not courting bankruptcy, and are indeed among the best investments now known to man.

"A prime example of the vulnerability of the MPAA study is this statement from page B–4:

> 'Most systems do not report financial statistics to the public since their securities are not publicly traded.'

Because of this, the study concluded, it was not possible to work with precise CATV operating cost data.

"Had MPAA's economists simply read CABLECAST, of course, they might have learned that the 15 public companies we regularly follow have over 3.3 million subscribers, or nearly 48% of all the cable homes in the country. Quite precise operating cost data is liberally sprinkled in the public record.

"Copyright payments are limited by the constraints of operating a cable system that are known to anyone who has ever studied a cable system. There are only so many nickels you can extract from one dollar of revenue.

"Because of the sundry other bills the modern cable ssytem must pay, including a stiff microwave fee just to get the distant signal, it isn't likely the copyright owner is entitled to more than one of those nickels (i.e., 5% of gross revenue).

"It's curious that the MPAA study infers cable systems will be able to subsidize distant signal copyright fees from possible future pay TV income. Curious because motion picture producers are also negotiating forcefully for maximum percentages on pay TV revenue.

"All signs currently point to the subsidization of pay TV terminals and marketing of pay TV services *not* by the motion picture company, but by the cable company, at the cable company's *risk*.

"Considering the dollars involved in the pay cable future, movie companies would seem ill-advised to extract excessive tithes from other cable operations, unless of course they hoped to control cable revenues without having to take ownership of the actual franchises.

"Perhaps we are simply witnessing a titanic struggle between economic forces over the sharing of tomorrow's entertainment medium pie.

"Or perhaps it is merely a case of the British asking the Hessians to help them subdue the colonies, but first charging the Hessians three times the going price for musketballs."

But even beyond the validity of predictions, the effect of Section 111's fee schedule is severe as applied to the existing industry's financial posture. Since nearly 90 percent of the nation's television households are within the top 100 television market areas, it is clear that the copyright owners anticipate that nearly all of their incomes from copyright fees will be obtained from the revenues generated in the major markets. Cable development in the major markets is thus vital to the copyright owner. How soon those markets are developed and how soon significant subscribed penetration is achieved should be obvious matters of concern to him.

Most cable systems of any size, that is over 3,500 subscribers, are owned by the multiple system operators. These entities are in the forefront of the companies currently building cable systems in the major markets, or holding major city franchises, or seeking franchises from major market cities. Thus the effect of copyright payments on the earnings of these companies is crucial to the major market development of cable television.

To ascertain the effect of the face schedule on the multiple system owner, NCTA asked eight of the largest MSO operators to determine from their most recently available fiscal quarter reports the total amount of copyright fees that would be payable by their cable systems if S. 1361 were in effect today. They were also asked to determine what percentage of their pre-tax income was represented by the copyright fee payments. The responses ranged from 7.5 percent to a high of 32 percent of pre-tax income, averaging out at 19 percent per company: Company A, 32 percent; Company B, 31.2 percent; Company C, 22.8 percent, Company D, 20.6 percent; Company E, 14.5 percent; Company F, 11.8 percent; Company G, 11.4 percent; Company H, 7.5 percent.

This average reduction of nearly 20 percent of pre-tax income through copyright fee payments would have a serious adverse effect on the already limited ability of these companies to borrow funds from investment sources. And the resulting lower net income would reduce the number of dollars that would go back into new system construction. With eroded borrowing power and reduced income, the pace of new system development is bound to suffer and further contribute to the already delayed development of cable television in our major cities.

Even without the added burden of high copyright fee payments, most large cable companies are faced with the prospect of declining earnings in the next several years as construction costs for major market cable systems outpace subscriber growth. Cable system costs in the metropolitan areas bear no relation to traditional cable construction costs in the smaller markets. FCC technical requirements as to channel capacity and "two-way" transmission capability add to these costs. While on the other hand, FCC television station carriage rules and regulations protecting the in-market stations' programing serve to limit the diversity of broadcast television programs a cable system can provide, making it more difficult to attract subscribers in the percentages of acceptance enjoyed in the older cable communities.

Obviously, under these conditions—assuming the proposed fee schedule to be in effect—copyright fee payments as a percent of pre-tax income would, of course, become increasingly larger than the average of about 20 percent today, compounding annually the problem of borrowing for and building tomorrow's cable systems. Nothing could be more injurious to the expectations of the public, the cable system entrepreneur, or the copyright owner than to place upon the cable operator, at this particular moment of CATV's growth, an unreasonable demand upon his already strained financial resources.

Given the burden of high copyright fee payments, the cable operator would have no recourse but to pass the burden on to the subscribing public, which is already beset by rising prices for other goods and services. Higher subscriber services charges would serve no useful end for the cable operator or the copyright owner. Cancelled subscription and potential subscriber resistance to inflated subscriber fees would combine to stifle growth and reduce the revenue source from which the copyright owner anticipates his fee and from which the cable operator derives his livelihood.

The copyright owners—chief among which are the motion picture producers—would also have adversely affected their expectations for profit from pay television motion picture services. Reduced interest among potential subscribers to basic cable services reduces the base from which added-services income can be derived, while a slowdown in metropolitan cable construction delays the time at which these services can be introduced in the major markets.

The independent operator currently serving in excess of 3,500 subscribers and the independent owners of proposed systems of whatever size are as much financially threatened by the size of proposed copyright payments as is the multiple system operator. Thus it would seem prudent to reduce Section 111's initial fee schedule by perhaps 50% and permit the process of future abitration, as provided for in Chapter 8 of S. 1361, to exact greater fees should the facts so warrant.

Nevertheless, the CATV industry is willing to support the present schedule of copyright royalty fees, contained in Section 111 of S. 1361, if that is the fair judgment of the Congress.

We would, however, like to point out our best assessment of the distribution of 1971 gross income of $19.6 million from television station purchase of *syndicated* (not network) programs shows $49.9 to $53.9 million dollars profit to program owners or 25 to 30 percent profit margin. Since NCTA is not privy to broadcaster-program owner financial agreements, we base our assessment of $179.6 million on TV Station Annual Financial Reports for the year 1971 (FCC Form 325) as released by the Research Branch, Broadcast Bureau, Federal Communications Commission. The disbursement percentages of gross income are an accepted averaging of the typical disbursements of syndicated program income, as expressed by one of the nation's largest program producers/distributors of network and syndicated programs. Of this $179.6 million, $53.9 million to $71.8 million (30–40% of gross) went to the distributor and $18.0 million (10% of gross) went as direct costs of distributor as payment for such services as preparation of videotapes, promotional advertising, etc.: $89.8 million to $107.8 million (50–60% of gross) went to the owners of syndicated programs; of which an estimated 50% of the *dollar amounts* was disbured to talent (writers, directors, actors, etc.) in the form of residual fees: leaving $49.9 million to $53.9 million (25–30%) as profit to the program owners.

In addition to the income received by the owner of syndicated programming, each broadcast station televising the programs receives, through sale of commercial time, advertising income above the costs paid by the station for its syndicated programming—which provides additional profits (to the station) from the syndicated programming.

We now turn to other aspects of the Bill. Section 111(b) makes the secondary transmission of pay-television (STV) an act of infringement and fully subject to civil and criminal penalties. But the rules and regulations of the Federal Communications Commission *require* CATV systems to carry all television broadcast stations, if within a given geographical area set out before, regardless of whether the station is a commercial broadcaster or an STV station. Here again, the CATV system would be faced with violating the copyright law, or violating the rules of the Federal Communications Commission, paying whatever the program supplier or broadcaster asks to avoid litigation, or going out of business. Further, Section 111(b) has only regulatory overtones—not copyright. Prohibiting secondary transmissions of Pay TV does not benefit the copyright owner nor the public, since the copyright owner would be paid by both the STV broadcaster and the CATV operator (under the statutory fee schedule) and the public could choose to watch that program if he chose to pay the STV operator for it. We suggest that this is a matter for regulation and not for the copyright law.

Section 111(a)(1) provides an exemption from copyright liability for master antenna systems. We submit that there is no rational distinction, in the eyes of the law, between MATV systems and CATV systems which receive only "local" signals. Each receives the same benefits from the copyrighted programs, and to be fair to copyright holders, each should pay royalties under the statutory fee schedule. Further, it would be unfair to subject CATV systems to payment of a copyright royalty if an apartment house owner in the same area was not required to pay. It seems more prudent public policy to leave these two reception and distribution facilities on an even competitive footing by striking Section 111(a)(1).

By the same token, Section 111(a)(4) exempts non-profit and government owned CATV systems from the requirement to pay fees. Here, again, it would seem more prudent public policy, in light of our national policy encouraging private enterprise, to leave these two reception and distribution facilities on an even competitive basis by striking Section 111(a)(4).

We are cognizant of, and completely agree with the Chairman of this Subcommittee when he stated on introduction of S. 1361, in remarks found at S5615 of the March 26, 1973, Congressional Record:

> Section 111 of the legislation approved by the subcommittee contains a comprehensive resolution of the CATV question, including both regulatory and copyright matters. The subcommittee adopted such a comprehensive provision in response to the recommendations of the then Chairman of the Federal Communications Commission. When Mr. Dean Burch became Chairman of the FCC he consulted the subcommittee concerning the development of coordinated procedures by the Congress and the Commission to facilitate a resolution of the CATV issue, and to permit the orderly development of the cable industry. Under the effective leadership of Chairman Burch substantial progress has been achieved in creating a constructive cable television policy for this Nation. The regulations adopted by the Commission are generally consistent with the recommendations made by the subcommittee in section 111 of the copyright bill. It is therefore anticipated that when the subcommittee processes the revision bill, it will eliminate those provisions of a regulatory nature that were the subject of the recent FCC rule-making proceedings.
>
> The subcommittee determined that the public interest justified, and practical realities required, the granting in certain circumstances of a compulsory license to perform copyrighted works. The subcommittee approved such licenses as part of the cable television, mechanical royalty, jukebox royalty, and performance royalty sections of the revision bill. With respect to each of those issues, the subcommittee decided that the Congress would determine the initial royalty rate, and that a Copyright Royalty Tribunal would be established for the purpose of making periodic review and adjustment of the rates.
>
> It has been proposed that special treatment should be accorded the cable television royalty issue. The principal justification for this position is a private agreement developed by Dr. Clay T. Whitehead, Director of the Office of Telecommunications Policy. The Whitehead agreement has been generally interpretated as seeking to eliminate the Congress from any role in determining cable television royalty rates. Even though public law places copyright affairs exclusively in the legislative branch, neither the Copyright Office of the Library of Congress, nor the House or Senate subcommittees having jurisdiction in copyright matters, were represented at Dr. Whitehead's meetings.

We therefore urge that "provisions of a regulatory nature that were the subject of the recent FCC rulemaking proceedings . . ." be eliminated in order that regulatory flexibility be maintained for now and in the future and in order to minimize the chance for conflict between requirements placed on CATV systems. If the Subcommittee so desires, we will be most pleased to supply recommended statutory langage ot accomplish that purpose.

We believe, however, that the Subcommittee has accomplished a well-researched, thorough, and fair resolution of strictly copyright matters. We do recommend that the provisions relating to a sports "blackout." (Section 111(c)(4)(c)) containing both anti-trust and communications policies, should also be eliminated for reasons which others will detail later in these hearings. For now, we suggest only that such matters be left to the Federal Communications Commission or other appropriate bodies where the benefits of flexibility can be maintained.

Subject to our previous comments on the amount of copyright royalty fees, we favor the adoption of Section 111(d) as written. We believe that the language of that subsection leaves regulatory matters properly in the hands of the administrative agency charged with the responsibility of regulating communications, with all of the advantages of administrative flexbility inherent in that approach. We also believe that it fully complies with the FCC's position on legislation contained in Chairman Burch's March 11, 1970, letter to Senator Pastore. Most importantly, we believe it to fully serve the public interest. We do suggest, however, that in order to allay the burden of copyright payments on small, family owned, single cable systems, systems of 3,500 subscribers or less be exempt from the payment of copyright royalty fees, and that an appropriate amendment be made to accomplish that purpose.

We also support the provisions of Section 111(e) as written, save for clerical adjustments to reflect the elimination of the regulatory aspects previously mentioned. Here again, the public interest will be served by allowing the Federal Communications Commission the latitude and flexibility to regulate an emerging and rapidly changing communications technology, yet giving all parties a forum to pursue whatever relief is deemed appropriate.

With respect to the definitions contained in Section 111(f)(1), we suggest changes in the definitions, deleting the present language and substituting therefor the following:

"(A) A "primary transmission" is an audio, video, or audio/video broadcast of a work subject to enforcement of the remedies provided by this Act, made to the public by a facility the signals of which are being received or further distributed by a cable system, regardless of where or when the performance or display was first transmitted.

(B) A "secondary transmission" is the further distribution of a "primary transmission" by a cable system simultaneously with the primary transmission.

(C) A "cable system" is any facility providing a cable service which in whole or in part receives signals transmitted by one or more broadcast stations licensed by the Federal Communications Commission and simultaneously distributes them by wire or cable or radio to subscribing members of the public within a political subdivision within which the facility operates."

With respect to the other definitions contained in Section 111(f) we believe them to be sufficiently precise, and in any event subject to review and change by the Federal Communications Commission.

In order to be fully consistent throughout the Act, we suggest that Section 110(5) be amended by adding:

> "Or (C) The transmission is made consistent with the purposes of Section 111 of this Title."

We believe that this slight addition will clarify the relationship of secondary transmissions to the dissemination of educational television programs to the public in the event they wish to substitute the CATV reception and distribution service for an individual receiving antenna.

Finally, we submit that no limitation should be placed on the reception of programs by way of CATV which are not copyrighted or subject to copyright.

In conclusion, I wish to thank the members of this Subcommittee and its staff for providing the public with a Bill so well drafted that it requires, in our judgment, very little change from what has already been noted in the introductory remarks of the Chairman which I have previously quoted.

I believe this Bill, if enacted, will not be easy for the CATV industry to live with—but NCTA believes that it well protects the public's interest—and it is that interest which we must all strive to serve.

Thank you for your courtesy and consideration. If we may be of further service in providing additional information or suggested statutory language, we shall be most pleased to do so.

CABLE TELEVISION
UNDER THE 1972 FCC RULES
AND THE IMPACT OF ALTERNATIVE COPYRIGHT FEE PROPOSALS

AN ECONOMIC ANALYSIS

by

BRIDGER M. MITCHELL

in
Association With

ROBERT H. SMILEY

September 20, 1972

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INTRODUCTION

Final rules of the Federal Communications Commission governing cable television service in the 100 largest television markets went into effect March 31, 1972, following six years of FCC proceedings during which development of CATV service in major cities has been effectively blocked by interim regulations prohibiting the importation of distant television signals. The rules as effective allow limited importation to occur, varying with the size of the market and the locally-receivable signals, but at the same time provide broad "exclusivity" protection to local stations for their programs, thus requiring cable systems to delete programs from the imported signals.

No provision for payment of fees by cable systems to the copyright owners of television broadcast programming shown on those systems is included in the FCC rules, and under the Fortnightly[1/] decision cable systems are not liable for copyright. Nevertheless, the Commission anticipates Congressional legislation to require copyright payments and would regard its enactment as a reaffirmation of the FCC's regulatory program toward cable television.

[1/] Fortnightly Corporation v. United Artists, 392 U. S. 390 (1968)

This study assesses the profitability of cable television in the major markets under the final FCC rules and determines the impact of alternative copyright fee schedules which have been proposed. Our research builds on the computer simulation method and detailed cost and revenue data developed by Comanor and Mitchell in their published study of the impact of the FCC rules as proposed in July 1970. We have considerably modified and expanded their work to include the following:

. . . .the March 1972 FCC rules

. . . .more accurate and detailed predictions of penetration in major markets

. . . .the effect of the exclusivity provisions on penetration

. . . .a comprehensive set of cable system parameters encompassing market type, available signals, system location and subscriber and construction characteristics

. . . .four alternative copyright fee schedules (including no fees)

In outline, the analysis of CATV profitability focuses on a number of market and system characteristics which can be identified as typical or representative of a cable system if it were to be constructed under current rules. By varying the characteristics (e.g., system size, or lineup of local signals, or housing density) over a comprehensive set of characteristics, the outlook for cable in nearly all parts of the major markets can be assessed. In this analysis, costs and prices have been measured in 1970 values; costs, revenues and rates of return are consequently in "real" terms. Except for rules changes since July 1970, cost figures are based on Comanor and Mitchell's detailed report. Throughout this study when discussing the size of a cable system we refer to the number of subscribers in its fifth year of operation, at which point it has virtually achieved its final size.

Our analysis includes revenues from subscribers, determined by penetration rates dependent on local and distant signals carried, and a realistic amount from advertising on a local origination channel. No revenues or costs have been attributed to the development of leased channels.

All systems considered in this study are newly constructed. The effect of potential copyright fees on existing systems in comparable market circumstances would be somewhat different only in the short run. For several years, these already-built systems would experience reduced profitability and the systems' owners would earn lower returns than they had anticipated. At the same time, revenues would still exceed operating costs, so that the original systems would not actually go out of business. But subsequently, when the systems required rebuilding, the copyright fees could make reconstruction unprofitable, since nearly the same investment considerations apply either to rebuilding an existing system or to constructing the same system in a similar but unwired community.

MARKET CATEGORIES AND SYSTEM LOCATION

In examining the probable effect of various provisions for payment of copyright fees we will consider separately the characteristics of typical cable systems in four types of markets: the top 50 markets, markets ranked 51-100, markets below 100, and areas located outside television markets. The FCC rules permit different signal carriage in each of these situations, and impose differential requirements affecting system costs. In addition, the density of housing, the prevalence of underground utilities and the level of family income also varies by market size. A tabular summary of these major market characteristics is set forth in Table 1.

As R. E. Park's econometric findings 2/ strongly demonstrate, the location within the market is also of fundamental importance to determining penetration levels. For this study we therefore subdivide each of the markets 1-50, 51-100, and 100+ into typical "middle market" and "edge market" systems. Middle market locations are close to off-the-air signals, while edge market systems are approximately half-way between the transmitter and the B-contour limit of the local signals. (The forth category, an "outside market" system, is necessarily at or beyond the location of a typical edge market system.) Thus the typical systems to be analyzed fall into one of seven boxes in the following matrix:

2/ "Prospects for Cable in the 100 Largest Television Markets"

TABLE 1

MAJOR CHARACTERISTICS OF FOUR MARKET TYPES

	Markets 1-50	Markets 51-100	Markets 101+	Outside Markets
Local signals typically available	3 networks, or 3 networks + 1 independent	3 networks	2-3 networks (some UHF)	1-2 networks (some UHF)
Imported signals allowed	2 in all cases; 2-3 independents typical	2 in all cases; 2 independents typical	maximum of 1 independent plus any missing networks	no restrictions
Exclusivity protection	Yes	Yes	No	No
Capacity requirements	20 channels 2-way capability	20 channels 2-way capability	12 channels 2-way capability	12 channels 2-way capability
Local origination	standard; minimum below 10,000 subscribers	standard; minimun below 10,000 subscribers	standard; minimum below 10,000 subscribers	minimum
Density (houses per mile)	150-200	125-150	100	80
Underground	10-20%	5-10%	5%	0%
Family income (1975)	$11,400-$12,200	$10,000-$11,400	$10,000	$9,000

Market Type / Location	1 - 50	51 - 100	101 +	Outside
Middle				- - -
Edge				

Within each box, indicating a specific market type/system location, we further consider the two or three most likely lineups of available local signals. While we have not reported every combination which can occur, the cases tabulated are representative of the majority of signal patterns to be encountered and they cover a degree of variation sufficient to include most other possibilities.

CABLE PENETRATION

At the time Comanor and Mitchell's research was undertaken virtually no reliable statistical information was available to quantify the effects on cable penetration of the number, types and quality of local signals available, the additional cable signals provided, the price of cable service and the incomes of potential subscribers. That study provided estimates of most of these variables by use of multiple regression analysis on a randomly selected sample of 149 systems drawn from the Television Factbook. The authors noted that these systems were largely outside of the top 100 markets or in areas of quite poor reception, or both. Projection of penetration in the major markets under the then-proposed FCC rules (allowing four distant independent signals) was recognized as subject to considerable error.

Since publication of the Comanor-Mitchell paper the measurement of factors determining penetration has been advanced considerably by Park in his study "Prospects for Cable in the 100 Largest Television Markets." Park uses statistical techniques closely related to those employed earlier. He improves on the Comanor-Mitchell study in three major ways:

First, all 63 cable systems analyzed by Park had at least three A-contour, good reception-quality signals available off-the-air.

Second, all data were verified with system operators by telephone interview, insuring greater accuracy than available from only published sources.

Third, two improved measures of signal quality were incorporated into the analysis. Distance of the cable system from each transmitter was explicitly included, and UHF signals were measured separately to account for more rapid signal attenuation with distance and the absence of UHF tuners in some households.

The complete penetration equation as estimated by Park measures the effects of the following variables:

.....number of off-the-air VHF signals, with separate categories for networks, duplicate networks, independent, educational and foreign signals; by distance from transmitter

.....number of off-the-air UHF signals, by the same categories; by distance from transmitter; with measurement of UHF set penetration

.....number of cable signals, by the same categories

.....color set penetration

.....annual subscriber price

.....annual family income

Park's research is particularly appropriate to the present assessment of the effect of alternative copyright fee schedules on the viability of cable systems in the major markets. In projecting penetration rates for the systems studied here the average figure predicted by Park's equation has generally been used, since this represents the central experience to be expected in the major markets. In addition, a selected number of intermediate sized systems have been analyzed using penetration rated 33% greater than predicted on average. Such increased penetration is definitely atypical, and would be expected to occur in only about one out of ten market situations, because of factors not fully accounted for in the penetration equation.

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DENSITY

Density, the number of homes per cable mile, can vary considerably from one potential franchise area to another. Comanor and Mitchell reported an average density of 95 within major markets, and 79 outside, in their sample of Factbook systems. More recently available data for a number of municipalities in the Dayton, Ohio and Boston, Massachusetts areas are tabulated in the appendix. For systems in this study we have assumed somewhat higher densities than considered by Comanor-Mitchell, ranging from 80 homes per mile outside of television markets up to 200 homes per mile with 20% of plant underground in the central areas of markets 1-50.

In practice, of course, both higher and lower densities will be encountered. But the tendency to a substantially higher figure for any important number of similar systems is unlikely in view of the FCC's emphasis that it will not authorize carriage of broadcast signals by systems which do not serve all parts of the community. 3/

3/ Federal Register, p. 3276, §180

THE EFFECT OF THE EXCLUSIVITY RULES

The new FCC rules require cable operators to "black-out" numerous classes of programs on imported signals when those programs are also shown by a local station. The degree of protection provided varies with the type of programming and may extend up to two years. For our purposes the primary effect of these rules is to reduce the attractiveness of distant signals to subscribers and thus reduce cable penetration. Aside from providing for one channel-switching device for each imported signal, we have not allowed any additional costs of performing the blacking-out function itself, keeping records, etc.

At this writing, evidence on the magnitude of the exclusivity effect is limited to a preliminary study by R. E. Park, "The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations." From detailed program listings for four stations---two networks and two independents---plus partial listings for ten other stations, Park synthesizes the expected proportion of a broadcast week that a distant signal would be blacked out. A portion of his findings are reproduced in Table 2.

Park's results indicate, for example, that in those top 50 markets in which local service provides three networks and one independent, the cable system importing two additional independents will be required to black them out about 39% of the time. If it imports a third independent (on a stand-by basis, since the rules

TABLE 2

PERCENTAGE OF TIME DISTANT SIGNAL CHANNELS ARE BLACKED-OUT

LOCAL SIGNALS	Number of Distant Signals Allowed	Number of Distant Stations From Which to Choose				
		2	3	4	5	6
Markets 1 - 50						
3 network + 2 independent	2	51%	35%	26%	20%	16%
3 network + 1 independent	2	39%	24%	15	11	8
3 network	3	52	27%	15	9	6
Markets 51 - 100						
3 networks	2	16%	6	2	1	0

Source: R.E. Park, "The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations," Table 2, p.5.

allow only two distant signals at any moment on the cable) and "fills in the blanks" where possible, it can reduce the blacked-out time to about 24%. Importing a fourth independent further reduces this to 15%, etc. The boxed-in figures represent the expected effect when no stand-by signals are imported.

The impact of the exclusivity rules on subscriber penetration is likely to be at least as great as the reduction in viewing hours. Programs receiving protection will be predominantly those with large audiences, many of whom would value an earlier or alternative viewing date or time which cable could otherwise provide. Nevertheless, lacking data to refine an estimate of this effect, we assume that exclusivity protection is equivalent in its impact on penetration to a proportionate reduction in the number of full-time distant independents carried on the cable, using the appropriate boxed figures from Table 2.

Will it be profitable for a cable system import stand-by independent signals? The costs of additional imports will rise as the CATV system must go further to find each additional independent. Concurrently, the proportion of time that can be filled in with each extra signal is declining. The exclusivity rules thus place the cable firm in a situation of sharply diminishing returns as regards additional penetration from distant signals. Generally, the answer will be "no." Exceptions may occur where the stand-by independent has particularly attractive programming, or when importation costs are less dependent on distance, as could occur with satellite transmission.

Regarding importation costs, we have assumed for all systems in this study that distant signals are delivered by cable system-owned microwave links of 50-100 miles per channel imported. Average distances to the first and second closest independents (in the top 25 markets) are tabulated in the appendix. These averages range from 91 to 208 miles to the closest signal, and 125 to 325 miles for the next closest for several types of markets. Thus the microwave cost estimates used here must be considered generally low, although they may be closer approximations for markets with several closely spaced systems which pool their microwave facilities.

COPYRIGHT FEE SCHEDULES

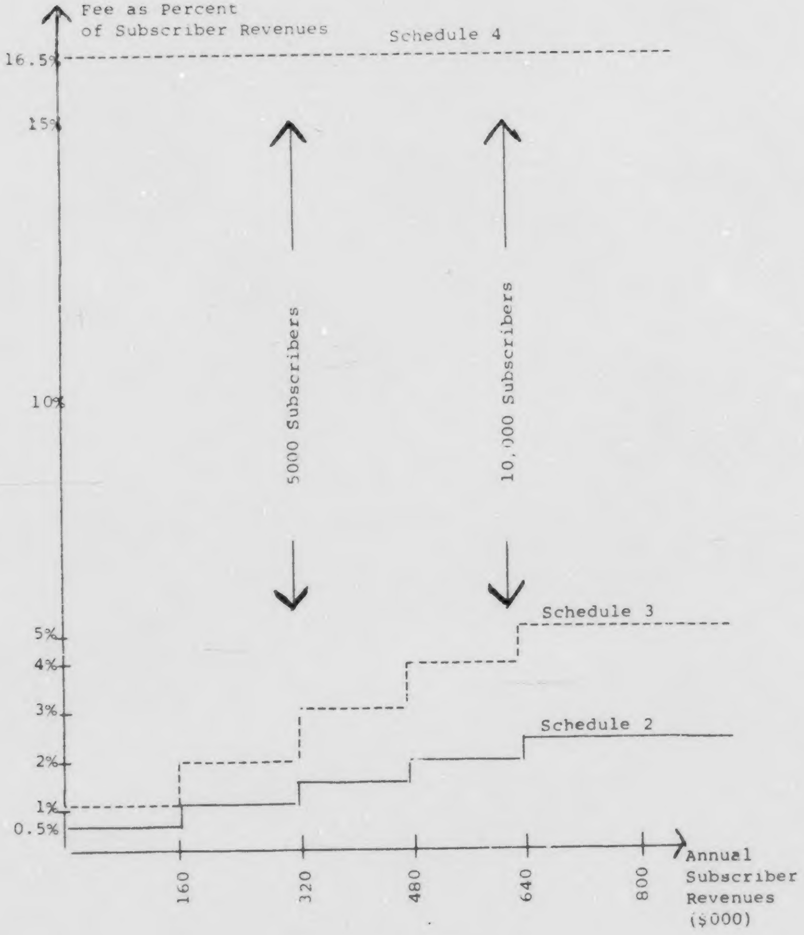
In the analysis which follows we consider four alternative fee schedules for payment by cable systems to copyright owners. Schedule 1 is the baseline case of zero fees. Schedules 2 and 3 levy successively larger fees as the system's revenue grows. Schedule 3 (incorporated in Bill S.644) begins at 1% of subscriber revenues, and rises to 5% of revenues exceeding $640,000 annually; Schedule 2 is exactly half of Schedule 3. For the fourth Schedule we consider a flat fee of 16.5% of subscriber revenues, regardless of the size of annual revenue. The exact details of these fees are set forth below and in the accompanying figure 1.

Copyright Fee Schedule No. 1	2	3	4	Annual Subscriber Revenue
0%	.5%	1%	16.5%	of 1st $160,000
0%	1.0%	2%	16.5%	of 2nd $160,000
0%	1.5%	3%	16.5%	of 3rd $160,000
0%	2.0%	4%	16.5%	of 4th $160,000
0%	2.5%	5%	16.5%	of remaining revenue

In comparing systems in different market circumstances and with alternative fee schedules, we keep unchanged the subscriber price as well as the system size and other attributes of the CATV service. Cable television systems have some of the attributes of a "natural monopoly," flowing principally from their high fixed-low variable

Figure I

Alternative Copyright Fee Schedules



Schedule 1 = no fee

cost nature. But, in practice, the behavior of cable systems is increasingly limited by local and federal regulation, and by competition among firms for franchises. Both of these forces sharply restrict the ability of cable firms to adjust price or output at will.

Present regulation and competition for new franchises, plus the threat of more extensive regulatory action if firm behavior is perceived as excessive, has kept monthly subscriber rates virtually constant in current prices over several years. Seiden, in 1970, found most recently franchised systems charging between \$5.00 and \$7.00 per month. In their sample of Factbook systems Comanor and Mitchell reported a mean price of \$5.00 per month. Park in 1972 has an annual average price of \$63 for his sample of A-contour cable systems. The assumption that moderate cost increases, including copyright fees, cannot be passed on in the form of higher prices is consistent with the recent market experience.

Assuming no price response by cable firms if a 16.5% surcharge were imposed requires further discussion. Firms would doubtless make strong representations to local authorities about the need for higher prices, and bids for new franchises would quote higher rates. But granting for the moment that regulators allowed part or all of the surcharge to be translated into higher subscriber rates, how would cable profits be affected?

The answer depends primarily on how rapidly penetration would decline as prices were raised; in technical economic terms, on the elasticity of demand. If, for example, a 16.5% increase in price, from $5.00 per month to $5.83, results in a 16.5% decrease in penetration, say from 30% to 25% of homes passed, then the higher price has (approximately) 4/ no effect on total subscriber revenue--it is fully offset by reduced demand for service.

A basic result of economic theory states that consumers' demand for a service will be increasingly sensitive to its price as more and closer substitutes are available for that service. Thus households in areas with a diversity of broadcast signals, with generally clear reception and with a variety of entertainment alternatives can be expected to decline service rapidly as prices rise. This availability of good substitutes for CATV describes most top 100 markets. The econometric work of R.E. Park confirms this degree of price elasticity of demand in such areas; in fact, the figures in the example above correspond almost exactly to Park's statistical findings. 5/ 6/

4/ Calculating the percentage changes, for convenience, in terms of the original price and penetration, results in a slight approximation. A more exact result is obtained using the average of the old and new price and penetration.

5/ Park, "Prospects for Cable...", p. 140.

6/ For a discussion of the effect of demand elasticity on maximum rates permitted by a regulatory authority, see Comaner and Mitchell, "The Costs of Planning: The FCC and Cable Television."

How, then would cable systems' profits be affected by a 16.5% copyright payment and a concommitant rise in subscriber rates? Revenues would be unchanged, while operating costs would increase sharply by the amount of the copyright payments. There would be some small offsetting changes in other incremental costs, resulting from the saving achieved by not serving the subscribers who do not purchase service at the higher price. For typical systems, there are rather small costs of installing additional drop lines, additional maintenance and billing expenses and slightly higher taxes and dues related to numbers of subscribers.

In consequence, the net effect of allowing higher subscriber rates in conjunction with 16.5% copyright fee payments would be to reduce rates of return to nearly the same levels as would be achieved by holding subscriber rates unchanged with the same 16.5% copyright fees. In addition, penetration would be lower, providing a narrower base for future leased-channel services capable of generating additional payments from cable systems to program suppliers.

We remind the reader that the discussion in the preceeding several paragraphs assumed a degree of upward price adjustment which has not been observed. In the remainder of this study we adhere to a fixed monthly price of \$5.00 7/ for maximum cable broadcast service allowed by the FCC rules. 8/

An analysis of the profitability of systems under the alternative assumption of higher rates and consequently reduced penetration would yield approximately the same findings.

7/ Plus \$1.00 for second television sets in 20% of households.

8/ One other reminder may be in order. Since we are considering all prices and costs in 1972 terms, increases in the monthly subscription rate at about the rate of increase of consumer prices generally will not contradict our observation that real subscription rates cannot be adjusted.

MEASUREMENT OF CABLE SYSTEM PROFITABILITY

To summarize the profitability of the typical cable systems of this study we will calculate the (pre-tax) financial rate of return on total capital invested in each system. The financial (or internal) rate of return[9] is the single comprehensive measure of investment in a cable system. Unlike ratio measures for a particular year (e.g. net revenues divided by total capital) it correctly recognizes the opportunity cost of front-end financing, i.e. that several years are required before systems achieve full penetration, during which time invested funds are needed. Using the financial rate of return permits us to compare the profitability of funds invested in CATV systems with other types of investments, and thus the likelihood of cable systems being constructed.

The rate of return required to induce investment in a cable system will depend on the proportion of total capital which can be obtained through debt instruments and the associated borrowing rates, and the minimum return demanded by equity investors. Because the cable industry more closely resembles a high-risk growth industry than a public utility, at least at the present time, both lenders and investors demand higher rates of return than for seasoned investments.

9/ The internal rate of return is that discount rate which equates the present value of revenues and costs over the lifetime of the system. For further discussion, see Comanor and Mitchell, "Cable Television and the Impact of Regulation," p. 184.

For this study we have held both revenues and cost at 1970 price levels over the full life of the cable system. Financial measures are consequently in real (constant dollar) terms. The corresponding rate of return concept is the financial return which would occur if prices did not rise throughout the economy; whereas in an inflationary period, investors expect price increases and demand higher returns in money terms to compensate them for the otherwise reduced value of their funds when their investment is recovered. Thus if investors expect a 4% rate of inflation to continue indefinitely and will invest in enterprises comparable to cable television only when they return 15% on average, the required rate of return in constant prices would be 11%.

A detailed investment survey 10/ of the CATV industry in late 1971 reports that mature cable companies with demonstrated earnings have found long-term credit expensive, and that institutional investors are looking for a 15% return as a combination of interest and equity appreciation. As a standard of minimum profitability necessary to generate investment in new cable systems, we will use a 10% constant-dollar financial rate of return on total capital. This is on the low side of recent financing experience of established CATV companies, and would therefore apply to new systems constructed by the larger multiple system owners today. New CATV firms lacking a track record will face higher costs of capital and will require somehwat higher rates of return to justify their construction.

10/ Halle & Stieglitz, Inc., "The Cable Television Industry."

RESULTS--AN EXAMPLE

We are now prepared to analyze the financial results for typical systems in the several market situations discussed earlier. For each system, the computer simulates the complete revenue and cost experience to be expected, using the parameters supplied by the analyst. The detailed cost and revenue schedules have been built into the Comanor-Mitchell computer program, modified to include the changes in FCC rules, penetration and costs discussed earlier and in the appendix of this study.

As an example, consider the abstract of the computer output reproduced in Table 3 . Part A indicates that this example is representative of a 25,000 subscriber system located near the middle of a top 50 market. Density is assumed to be 200 homes per mile, and family income $12,200. Annual subscriber rates are $62.40, corresponding to $5.00 per month plus a small additional amount for second sets. Since this is a central urban location, 20% of the cable miles are underground, and standard local origination equipment has been budgeted. Revenue from advertising on the cablecasting channel has been estimated at $2.20 per subscriber annually. The table of signals carried shows that 3 VHF networks plus one viewing-test network are available off-the-air. In addition there is one UHF independent and a VHF educational station. In addition to these broadcast signals, the cable system imports two independents and

TABLE 3

ABSTRACT OF COMPUTER OUTPUT FOR TYPICAL CATV SYSTEM

PART A. - INPUTS AND PARAMETERS

Market Rank: 1-50

System Location: Middle

System Size in 5th Year: 25,000 Subscribers

Homes Per Mile=200

Family Income=12200

Annual Charge Per subscriber: $62.40

Underground: 20.0%

Local Origination: Standard

AD Revenues Per Subscriber: $2.20

Number of Microwave Channels: 3

Average Number of Hops Per Microwave Channel: 3.

	Local		Signals Off Air Viewing Test		Total	Additional Cable Signals Imported
	VHF	UHF	VHF	UHF		
Networks	3	0	1	0	4	0
Independents	0	1	0	0	1	2
Educational	1	0	0	0	1	1
Total	4	1	1	0	6	3

Predicted Penetration 5th Year

With Fulltime Distant Signals	0.281
With Distant Signals Subject to Exclusivity protection	0.272

Table 3 (continued)

PART B. - GROWTH AND REVENUES

Year	1	2	3	4	5	6	7	8	9	10	Total
Subscribers	7500	13750	20000	23750	25000	25500	26007	26519	27037	27560	
Penetration	8.2%	15.0%	21.8%	25.8%	27.2%	27.8%	28.3%	28.9%	29.4%	30.0%	
Total Revenue ($000)	$240	680	1080	1400	1560	1616	1648	1681	1714	1747	13366

PART C. - COPYRIGHT FEES AND FINANCIAL RETURN SUMMARY

		Financial Rate of Return Assuming	
		10 year life	15 year life
Copyright fee schedule number:	1.	7.8%	10.4%
	2.	7.2%	9.9%
	3.	6.6%	9.3%
	4.	2.7%	5.5%

one educational station. These signals are imported by microwave, averging 3 hops of 35 miles each per channel.

Within five years the system is assumed to reach maturity, apart from further growth due to rising incomes or enlargement of its franchise area. Penetration is predicted to be 28.1% if the distant signals are fully available, but 27.2% as a result of exclusivity protection on the independent channels.

Part B summarizes the growth of penetration, subscribers, and system revenue (including advertising) over the first 10 years.

In Part C we may assess the impact of copyright fees on profitability. For each of the four fee schedules described earlier we report two rates of return--one assuming a 10 year average lifetime of capital, the second assuming 15 years. If fixed capital equipment is replaced about every 15 years, this system will earn a 10.4% real rate of return on total invested capital absent any copyright fees. Alternatively, the statutory schedule (number 3) reduces the rate of return to 9.3%, and the flat 16.5% fee lowers returns sharply to 5.5%. A shorter lifetime for equipment reduces these returns by 2.5 to 3 percentage points.

In the analysis below we report rates of returns based only on 15-year lifetimes. Fifteen years represents a compromise between somewhat longer physical lifetimes for some parts of the cable plant and rather shorter economic lifetimes of currently operating systems experiencing technological obsolescence. It appears unlikely that 20-channel systems built today will remain competitive beyond 1985 without major rebuilding.

RESULTS--IN DETAIL

The financial prospects for cable under the final FCC rules and the impact of alternative copyright fee schedules are contained in the seven tables which follow. While we shall briefly review the major findings here, the reader should consult the tabulations for particulars. Tables 4 and 5 report the expected experience in middle markets of large and intermediate sized systems respectively.

Line 1 of Table 4 restates the example system discussed in detail above. Lines 2 and 3 are for similarly situated communities with somewhat different sets of local signals. Penetration ranges from about 22-27% and rates of return from 7.5 to 10.4% when there are no copyright fees. Despite somewhat higher penetration rates, systems in the second 50 middle markets earn lower returns, principally because of reduced density, while in the lowest ranked markets there is great variation, with profitable, 55% penetration systems when one network is missing from the local signals.

Intermediate-sized systems in middle markets are decidedly below the 10% rate of return needed to attract investment funds. Except where quite large systems of 25,000 or more subscribers can be built, central city areas of the major markets are not bright prospects for cable under present rules, even without copyright payments.

TABLE 4

LARGE SYSTEMS IN MIDDLE MARKETS

SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee Schedule No. 1	2	3	4
Size=25,000			Markets 1-50 Density=200		Underground=20%			
1. 3NV,1IU,1EV	1NV	2I,1E	$12,200	27.2%	10.4%	9.9%	9.3%	5.5%
2. 3NV,1EU	-	3I,1E	11,400	24.7	9.2	8.7	8.1	4.5
3. 3NV,1IV,1IU,1EV	-	1I,1E	12,200	21.9	7.5	7.0	6.5	3.1
Size=25,000			Markets 51-100 Density=150		Underground=10%			
4. 3NV,1EU	-	2I,1E	$11,400	24.0%	6.0%	5.5%	5.0%	1.7%
5. 2NV,1NU	-	2I,1E	10,200	30.7	8.3	7.8	7.3	3.8
6. 1NV,2NU	-	2I,1E	10,000	35.3	10.3	9.7	9.1	5.4
Size=15,000			Markets 101 + Density=125		Underground=5%			
7. 1NV,2NU	-	1I,1E	$10,000	29.6%	9.2%	8.7%	8.2%	3.8%
8. 2NU	-	1N,1I,1E	10,000	55.4	19.9	19.3	18.6	12.8

In these tables, N means network, I means independent, E means educational;
V means NHF, U means UHF.

TABLE 5

INTERMEDIATE-SIZE SYSTEMS IN MIDDLE MARKETS

	SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life) Copyright Fee Schedule No.			
	Local	Viewing Test	Imported by cable	Family Income	Penetration	1	2	3	4
	Size=10,000			Markets 1-50 Density=200		Underground=20%			
1.	3NV,1IU,1EV	1NV	2I,1E	$12,200	27.2%	6.1%	5.7%	5.4%	1.4%
2.	3NV,1EU	-	3I,1E	11,400	24.7%	5.2	4.8	4.5	0.7
3.	3NV,1IV,1IU, 1EV	-	1I,1E	12,200	21.9%	4.0	3.7	3.4	*
	Size=10,000			Markets 51-100 Density=150		Underground=10%			
4.	3NV,1EU	-	2I,1E	$11,400	24.0%	2.4%	2.1%	1.7%	*
5.	2NV,1NU		2I,1E	10,200	30.7	4.5	4.1	3.8	0.1
6.	1NV,2NU	-	2I,1E	10,000	35.3	6.1	5.7	5.4	1.3
	Size=7,500 #			Markets 101 + Density=125		Underground=5%			
7.	1NV,2NU	-	1I,1E	$ 10,000	29.6%	6.5%	6.2%	5.9%	1.0%
8.	2NU	-	1N,1I,1E	10,000	55.4	16.1	15.8	15.4	9.1

= minimum origination facilities and no advertising revenues.

*= negative return

The prospects for large systems at the edge of major markets (Table 6) are brighter. In the top 50 markets penetration is in the 34-38% range with rates of return 11.0-12.6%. In the second 50 markets penetration ranges up to 45% with rates of return from 9.7-13.4%. In the smaller markets and also the fringe (outside) areas we find more heterogeneous results, with quite profitable CATV possibilities where fewer than three networks are available.

The corresponding intermediate-sized edge systems are again unprofitable in all 3 network cases. This indication of the importance of large systems, or economics of scale in technical terms, is developed in more detail in Table 8, by systematically varying the size of the most profitable system from each of the four market types in Tables 4-7. While large systems would seem feasible in the major metropolitan areas, as of March 1971 only 20 systems had more than 20,000 subscribers and the largest had less than 50,000 [11].Some fraction of these economies of scale can be achieved when a series of smaller systems are under common ownership and thereby realize savings from efficient use of management and technical personnel and can share local programming and and signal importation expenses.

The results presented in tables 4-8 are based on market, economic and construction factors which typify the most common situations which will be encountered in middle and edge locations of each of the four types of markets. Of course, within each category there will be a degree of variation, clustered around the typical situa-

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[11] Television Digest, CATV and Station Coverage Atlas.

TABLE 6
LARGE SYSTEMS IN EDGE MARKETS

	SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
	Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee Schedule No. 1	2	3	4
		Size=25,000		Markets 1-50 Density=150		Underground=10%			
1.	3NV,1IU,1EV	1NV	2I,1E	$12,200	37.9%	12.6%	12.0%	11.4%	7.6%
2.	3NV,1EU	-	3I,1E	11,400	37.1	12.3	11.7	11.1	7.0
3.	3NV,1IV,1IU, 1EU	-	1I,1E	12,200	34.4	11.0	10.5	9.9	5.9
		Size=25,000		Markets 51-100 Density=125		Underground=5%			
4.	3NV,1EU	-	2I,1E	$11,400	36.3%	9.7%	9.2%	8.6%	4.7%
5.	2NV,1NU	-	2I,1E	10,200	38.4	11.0	10.4	9.8	5.7
6.	1NV,2NU	1NV	2I,1E	10,000	44.9	13.4	12.8	12.2	7.9
		Size=15,000		Markets 101 + Density=100		Underground=5%			
7.	1NV,2NU	-	1I,1E	$10,000	41.5%	10.7%	10.2%	9.7%	4.9%
8.	2NU	-	1N,1I,1E	10,000	65.5	19.0	18.4	17.8	12.0
		Size=15,000 #		Outside Markets Density=80		Underground=0%			
9.	2NV	-	1N,3I,1E	$ 9,000	50.1%	11.4%	10.9%	10.3%	5.2%
10.	2NU	-	1N,3I,1E	9,000	65.5	16.5	15.9	15.2	9.5%

#=Minimum origination facilities and no advertising revenues

TABLE 7

INTERMEDIATE-SIZE SYSTEMS IN EDGE MARKETS

SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee Schedule No. 1	2	3	4
	Size=10,000		Markets 1-50 Density=150		Underground=10%			
1. 3NV,1IU,1EV	1NV	2I,1E	$12,200	37.9%	7.3%	7.0%	6.6%	2.2%
2. 3NV,1EU	-	3I,1E	11,400	37.1	7.1	6.8	6.4	2.0
3. 3NV,1IV,1IU, 1EU	-	1I,1E	12,200	34.4	6.4	6.0	5.7	1.5
	Size=10,000		Markets 51-100 Density=125		Underground=5%			
4. 3NV,1EU	-	2I,1E	$11,400	36.3%	5.5%	5.2%	4.8%	0.7%
5. 2NV,1NU	-	2I,1E	10,200	38.4	6.5	6.1	5.7	1.4
6. 1NV,2NU	1NV	2I,1E	10,000	44.9	8.1	7.7	7.3	2.7
	Size=7,500 #		Markets 101 + Density=100		Underground=5%			
7. 1NV,2NU	-	1I,1E	$10,000	41.5%	7.8%	7.5%	7.1%	1.9%
8. 2NU	-	1N,1I,1E	10,000	65.5	15.3	15.0	14.6	8.4
	Size=7,500 #		Outside Markets Density=80		Underground=0%			
9. 2N V	-	1N,3I,1E	$ 9,000	50.1%	7.4%	7.0%	6.7%	1.3%
10. 2NU	-	1N,3I,1E	9,000	65.5	12.3	11.9	11.5	5.7

#=Minimum origination facilities and no advertising revenues

TABLE 8

Size of System and Rate of Return

Edge Markets 1-50

Density = 150 Underground = 10%

Income = $12,200 Penetration = 37.9%

Signals:

Local	3 NV, 1 IU, 1 EV
Viewing Test	1 NV
Imported by Cable	2 I, 1 E

Financial Rate of Return
(15 year life)

Size (Subscribers in 5th Year)	Copyright Fce Schedule No. 1	2	3	4
3500 #	0.1%	*	*	*
5000 #	3.6	3.4	3.2	*
7500 #	7.6	7.3	7.0	2.4
10000	7.3	7.0	6.6	2.2
15000	9.8	9.3	8.8	4.6
25000	12.6	12.0	11.4	7.6
50000	15.0	14.3	13.6	9.5

Edge Markets 51-100

Density = 125 Underground = 5%

Income = $10,000 Penetration = 44.9%

Signals:

Local	1 NV, 2 NU
Viewing Test	1 NV
Imported by Cable	2 I, 1 E

Size (Subscribers in 5th Year)	Copyright Fce Schedule No. 1	2	3	4
3500 #	0.8%	0.6%	0.4%	*
5000 #	4.4	4.2	4.0	*
7500 #	8.5	8.2	7.9	3.1
10000	8.1	7.7	7.3	2.7
15000	10.6	10.1	9.6	5.1
25000	13.4	12.8	12.2	7.9
50000	15.9	15.1	14.4	10.2

TABLE 8
(con't)

Middle Markets 101 +

Density = 125 Underground = 5%

Income = $10,000 Penetration = 55.4%

Signals:
Local 2 NU
Viewing Test - -
Imported by Cable 1 N, 1 I, 1 E

3500 #	4.7%	4.5%	4.2%	*	
5000 #	9.9	9.7	9.4	3.2	
7500 #	16.1	15.8	15.4	9.1	
10000	17.0	16.5	16.1	10.0	
15000	19.9	19.3	18.6	12.8	
25000	23.8	23.0	22.2	16.4	

Edge Markets Outside

Density = 80 Underground = 0%

Income = $9000 Penetration = 65.5%

Signal:
Local 2 NU
Viewing Test --
Imported by Cable 1 N, 3 I, 1 E

3500 #	1.4%	1.2%	1.0%	*	
5000 #	6.4	6.2	5.9	*	
7500 #	12.3	11.9	11.5	5.7	
10000 #	13.6	13.2	12.7	6.7	
15000 #	16.5	15.9	15.2	9.5	
25000 #	19.5	18.7	17.9	12.4	

= minimum originator facilities and
no advertising revenue.
* = negative return

tions we have reported. Some communities will have higher incomes, others will require extensive undergrounding, still others will require high-cost local origination facilities, etc.

To measure the sensitivity of our findings for typical systems to such variations, we have rerun all of the intermediate-sized systems (tables 5 and 7) assuming that penetration is one-third greater than would be expected on average, for each set of market characteristics. A variety of unmeasured factors can cause actual penetration to vary above or below the average value predicted by the penetration equation. In increasing the average value by one-third we have in effect selected only the 10% of the cases in which penetration is most favorable; in other words, nine out of 10 communities having the same signal lineups, income, etc. will have lower penetration.

Turning to the results in Tables 9 and 10 we find that such unusually high penetration is sufficient to produce at least one profitable system in each type of market, at least if copyright fees are absent. Thus, 7,500-10,000 subscriber systems have some chance of earning a going rate of return in the top 100 markets only when local circumstances produce unusually favorable penetration.

We turn finally to the financial prospects for cable when copyright fees are required. The predominant effect of Schedule 3, the statutory fees proposed in S.644, is to reduce the financial rate of return on total capital a full percentage point for profitable

TABLE 9
10% Most Favorable Penetration Conditions

INTERMEDIATE-SIZE SYSTEMS IN MIDDLE MARKETS

SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee Schedule No. 1	2	3	4
	Size=10,000		Markets 1-50 Density=200		Underground=20%			
1. 3NV, 1IU, 1EV	INV	2I, 1E	$12,200	36.3%	10.2%	9.8%	9.4%	4.9%
2. 3NV, 1EU	-	3I, 1E	11,400	32.9	8.0	7.7	7.3	3.0
3. 3NV, 1IV, 1IU 1EV	-	1I, 1E	12,200	29.2	6.9	6.6	6.2	2.1
	Size=10,000		Markets 51-100 Density=150		Underground=10%			
4. 3NV, 1EU	-	2I, 1E	$11,400	32.0%	5.9%	5.5%	5.2%	1.1%
5. 2NV, 1NU	-	2I, 1E	10,200	40.9	7.4	7.0	6.7	2.4
6. 1NV, 2NU	-	2I, 1E	10,000	47.1	10.4	10.0	9.6	5.0
	Size=7,500 #		Markets 101 + Density=125		Underground=5%			
7. 1NV, 2NU	-	1I, 1E	$10,000	49.5%	15.1%	14.7%	14.3%	8.4%
8. 2NU	-	1N, 1I, 1E	10,000	73.9	20.1	19.7	19.3	12.3

= minimum originator facilities and no advertising revenue.

TABLE 10
10% Most Favorable Penetration Conditions

INTERMEDIATE-SIZE SYSTEMS IN EDGE MARKETS

SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
					Copyright Fee Schedule No.			
Local	Viewing Test	Imported by cable	Family Income	Penetration	1	2	3	4
	Size=10,000		Markets 1-50 Density=150		Underground=10%			
1. 3NV,1IU,1EV	1NV	2I,1E	$12,200	50.5%	11.7%	11.3%	10.9%	6.0%
2. 3NV,1EU	-	3I,1E	11,400	49.5	11.5	11.1	10.7	5.8
3. 3NV,1IV,1IU 1EU	-	1I,1E	12,200	45.9	10.7	10.3	9.9	5.2
	Size=10,000		Markets 51-100 Density=125		Underground=5%			
4. 3NV,1EU	-	2I,1E	$11,400	48.4%	8.7%	8.3%	7.9%	3.2%
5. 2NV,1NU	-	2I,1E	10,200	51.2	9.7	9.3	8.9	4.0
6. 1NV,2NU	1NV	2I,1E	10,000	59.9	12.6	12.2	11.8	6.7
	Size=7,500 #		Markets 101 + Density=100		Underground=5%			
7. 1NV,2NU	-	1I,1E	$10,000	55.3%	13.4%	13.1%	12.7%	7.0%
8. 2NU	-	1N,1I,1E	10,000	87.4	19.3	18.9	18.5	11.6
	Size=7500 #		Outside Markets Density=80		Underground=0%			
9. 2NV	-	1N,3I,1E	$ 9,000	66.9%	12.8%	12.5%	12.1%	6.3%
10. 2NU	-	1N,3I,1E	9,000	87.3	16.0	15.6	15.2	8.8

#=Minimum origination facilities and no advertising revenues

and near-profitable systems, and by somewhat less for systems well below the 10% return level. Thus, in the example system (the first line of Table 4) the rate of return falls from 10.4 to 9.3%.

A one-point change in the rate of return on total capital has a considerably larger effect on equity holders. Suppose that one-half to two-thirds of the cable system is financed by 8% 12/ debt instruments. Because of leverage, a 10% return on total capital will then correspond to a return on equity up to 13% or 14%. In consequence, a decline to a 9% return on total capital can reduce the return on equity by two to three percentage points, depending on the capital structure of the system. Changes of this magnitude are more than sufficient to postpone or eliminate construction of cable systems which otherwise appear marginally profitable.

The preponderance of evidence in Tables 4-10 is that large systems at the edges of top 100 markets will earn a 10-13% rate of return before copyright payments, large systems in middle markets are not likely to exceed 10%, and intermediate and smaller-sized systems will be marginally profitable only where special factors operate. Copyright fees, at the level of Schedule 3, would significantly slow the rate of growth of cable in the major markets, particularly in middle areas with good quality signals and in edge market communities of intermediate size.

12/ In an inflationary period borrowing costs would be higher by approximately the expected rate of inflation.

Copyright fee schedule number 2 is exactly one-half the rate of schedule 3. As expected, it has approximately half the effect of schedule 3 in reducing the rate of return for all systems.

Schedule 4 is the flat 16.5% copyright fee. Its effect on rates of return is devasting. Of all variations studied in the top 100 markets, only a single system earns a 10% return--the 50,000 subscriber edge market 51-100 system in Table 8. Fee payments of this magnitude would effectively halt cable growth in the large cities.

CONCLUSION

The outlook for early development of cable television service in the major cities is at best mixed. As compared with the rules discussed two years ago, the final FCC rules more tightly restrict the choice of broadcast signals a system can provide to its subscribers.

Analysis of the important variations in potential market and cable systems characteristics in these urban areas demonstrates that only the largest systems, or multiply-owned systems of slightly smaller scale, will be viable in the central city areas where off-the-air reception quality is high, and then only under favorable construction and penetration conditions. At the edges of these markets returns will be sufficient to attract investment in the largest-scale systems, but systems of 10,000-15,000 will be profitable only under especially favorable circumstances.

In an investment environment in which the majority of urban households can be profitably wired for cable television service only when atypically propitious cost and demand factors occur, to require more than quite limited copyright payments will significantly retard or halt CATV expansion in the urban markets. The proposed statutory fee schedule in S.644 (up to 5% of subscriber revenue) would generally lower rates of return on total capital a full percentage point for systems in the profitable range, and in an important proportion of cases its leveraged effect on equity investors would be sufficient to create unprofitable systems.

As expected, a fee schedule of one-half that in S.644 reduces rates of return on total capital about one-half a percentage point. Fees of this magnitude would restrict cable construction primarily in market circumstances where returns are already limited for other reasons. In contrast, a flat 16.5% copyright payment would create a decidedly unprofitable investment climate for cable television throughout the top 100 markets, far outweighing the limited prospects opened up by the 1972 FCC rules.

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APPENDIX

Modified Costs and Revenues

Several cost items in the Comanor-Mitchell Report have been modified for this study, either to take account of the FCC rules as finally adopted or as a result of the availability of more recent information. A brief summary of those costs which were modified for all systems investigated in this report is presented below:

1. Local Franchise Tax. 5% of gross revenues annually.

2. FCC Fee. $35 initial fee plus $0.30 per subscriber annually.

3. Channel switchers. One switcher included in capital equipment costs for each imported signal.

4. Pole rent. All results reported here include pole rent of $250 per aerial mile in top 100 markets, $175 in other markets.

5. Local origination. We assume the Comanor-Mitchell standard systems, with capital costs of $38,000 and annual operating expenses of $4300, and for smaller systems a minimum system, with capital costs of $11,000 and operating expenses of $2500 per year for live origination. All systems are assumed to provide a time-and-weather channel.

6. Public service channels. The final FCC rules require CATV systems to provide 3 non-broadcast channels for non-commercial public access, educational access, and government access respectively. The public access channel is to be provided without charge, while the other two channels will be free for five years. The costs of meeting these provisions are taken to be an additional 75% of the capital costs assumed for local origination, plus $4875 per year for part-time technician salaries.

7. The previously proposed 5% "public dividend" tax for support of non-commercial broadcasting has been eliminated.

8. Rate of subscribers growth over time. Park's recent research on cable penetration completed after the publication of the Comanor-Mitchell Report, indicates a more rapid maturation of cable growth than was previously assumed. While the precise growth path has not been definitively established, for this study we have increased the rate of subscriber growth so that the typical system reaches its mature size in the fifth year. Thereafter, some additional growth occurs as real incomes of potential subscribers are assumed to rise at a rate of 2% per year.

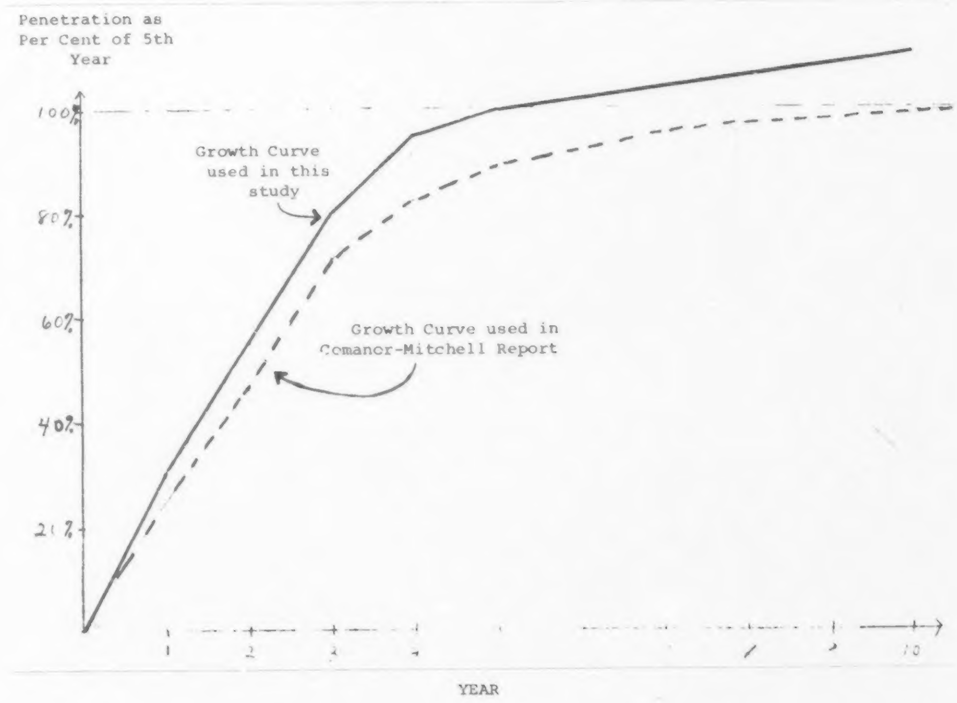
   As compared with Comanor-Mitchell, the effect of these modifications is to increase the size of typical systems in two ways:
   a) study systems gain subscribers more rapidly in early years;
   b) the size of a study system is measured in its fifth year, rather than its size after twelve to fifteen years.

   Figure A1 provides a graphical comparison of the growth curve used for this study and the earlier Comanor-Mitchell study.

As in the Comanor-Mitchell Report, financial (internal) rates of return are calculated for a firm of indefinite life by assuming that the firm reaches an equilibrium of revenues and costs after one 15-year lifetime, or generation, of equipment. Thereafter, the plant is rebuilt periodically, while subscriber penetration is held constant at the mature level. The rate of return is generally robust with respect to exact assumptions about conditions in later generations. Another solution to this terminal value problem is to assign the firm a value at the end of its first generation, based on operating characteristics such as revenues, subscribers, etc. For an example of this method see L. L. Johnson, "Cable Communications in the Dayton Miami Valley: Basic Report."

Figure A1

Rate of Subscriber Growth over Time



The Penetration Equation

Technical details of the penetration equation are summarized below. For further discussion see R. E. Park, "Prospects for Cable in the 100 Largest Television Markets."

$$\log\left(\frac{Pen}{1 - Pen}\right) = -8.159 + 3.098 \log X_N + 0.290 \log X_D$$
$$+0.212 \log X_I + 0.298 \log X_E - 0.540 \log X_F$$
$$-1.473 \log P + 1.398 \log Y + 0.523 \log C$$

where

$$X_i = \frac{1 + W_i}{1 + 0.731u \sum_{U_i}(1-d^{1.6})^{1/1.6} + \sum_{V_i}(1-d^{1.6})^{1/1.6}}$$

i = N = network
D = duplicating network
I = independent
E = educational
F = foreign

W_i = number of cable signals of type i

U_i = number of B-contour off-air UHF signals of type i

V_i = number of B-contour off-air VHF signals of type i

Pen= penetration = subscribers/households passed by cable

P = annual price

Y = median family income

C = color set penetration

u = UHF set penetration

In order to use Park's estimated equation to predict penetration for the typical systems investigated in this report, representative values must be assigned to the variables of the equation. The following values are employed in all of the simulations:

P = $62.40, corresponding to the $5 per month plus $1 per month for 20% of subscribers as a charge for second set.

C = 50%. The effect of varying color set penetration is not estimated with sufficient precision to incorporate variations in color set ownership across different types of markets.

u = 80% if 0 local network UHF signals
90% if 1 local network UHF signal
95% if 2 local network UHF signals
99% if 3 local network UHF signals

F = 0. Foreign stations are not included among the signals carried by study systems.

In simulating cable systems for this study, we consider systems located in the central area of a television market, where off-the-air signal quality is generally high, and outlying areas of the same market, where quality is diminished. In the penetration equation the distance variable $\underline{d}$ is a measure of the reduction in quality. A $\underline{d}$ value of 0 corresponds to a viewer in the center of the market, while a value of 1 represents a viewer at the B-contour of the off-the-air signal.

For the systems in this study we have used the following values:

In middle markets:
d = 0 for local stations
d = 1 for viewing-test stations

In edge markets:
d = 0.5 for local stations
d = 0.75 for viewing-test stations

Tables 9 and 10, "Ten Percent Most Favorable Penetration conditions," are calculated using 133% of the penetration implied by Park's equation above. This corresponds approximately to the penetration value at the upper 10% confidence limit.

Table A1

Households, Population and Density in Dayton, Ohio (Market No. 41)

A. Dayton Urban Area

City	Population (1970)	Dwelling Units (1970)	Density (Dwelling Units Per Street Mile)
Dayton	243,601	85,401	149
Kettering	69,599	22,809	110
Fairborn	32,267	10,156	107
Miamisburg	14,797	4,839	71
Vandalia	10,796	3,335	96
West Carrollton	10,748	3,476	87
Centerville	10,333	2,984	66
Oakland	10,095	3,795	90
Four Communities Less than 10,000 persons	23,364	7,683	---
	425,620	144,487	119

B. Dayton Urbanized Area (excluding urban area above)

	Population (1970)	Dwelling Units (1970)	Density (Dwelling Units Per Street Mile)
Dayton Urbanized Area (excluding urban area above)	583,000	192,000	110

source: Johnson, L. L., "Cable Communications in the Dayton Miami Valley: Basic Report."

Table A2

Population, Households, Density and Underground
in Boston, Massachusetts (Market No. 6)

City	Population	Homes	Density	Underground
Boston	613,140	224,825	340	51%
Brookline	58,090	18,954	234	40.5%
Chelsea	30,122	8,154	210	17%
Somerville	87,047	28,323	328	21.6%

source: Foundation 70 "Cable in Embryo: Economic Consideration for Urban Franchising."

TABLE A3

Average Characteristics of Signals Available in Top 100 Markets

Markets 1-50

Line	Number of Markets	Local Network Signals	Independent		Educational		Viewing Test		Distance to Closest Top 100 Independents		Family Income (1975)
			V	U	V	U	Net.	Ind.	1st.	2nd.	
(1)	34	3 NV	0.6	1.4	0.6	0.6	0.1	0.0	208	325	$12,229
(2)	11	3 NV	0	0	0.4	0.5	0.3	0.2	184	252	11,416
					Markets 51-100						
(3)	21	3 NV	0	0	0.4	0.4	0	0	198	325	$11,371
(4)	7	2 NV, 1NU	0	0	0.1	0.4	1.1	0.1	163	252	10,217
(5)	5	1 NV, 2NU	0	0	0.2	0.2	0	0	91	125	11,713
(6)	6	3 NU	0	0.2	0	0.3	0	0.2	114	174	11,611

TOP-100 TV MARKETS; AUTHORIZED [illegible] SIGNAL [illegible]; DISTANCE BETWEEN [illegible]
AND EACH OF THE TWO NEAREST TOP-25 MARKETS HAVING [illegible]

Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 [illegible] Station(s); with Air Mileage Between [illegible]	
	Net	Ind	Net	Ind	Net	Ind		Closest [illegible]	[illegible]
1. New York, N.Y. Linden-Paterson NJ	3	5	-	-	-	2	10	Philadelphia, Pa.-Burlington, New Jersey 93 m.	Hartford-New Haven-New Britain-Waterbury, Conn. [illegible]
2. Los Angeles-San Bernardino-Corona-Fontana, Calif	3	8	-	-	-	2	13	San Francisco-Oakland- San Jose Calif. 347 m.	Sacramento-Stockton-Modesto, Calif. [illegible]
3. Chicago, Ill	3	4	-	-	-	2	9	Milwaukee, Wis. 89 m.	Indianapolis-Bloomington, Ind. [illegible]
4. Philadelphia, Pa.-Burlington, N.J.	3	3	-	-	-	2	8	New York, NY-Linden-Paterson, N.J. 93 m.	Baltimore, Md [illegible]
5. Detroit, Mich.	3	3	-	-	-	2	8	Cleveland-Lorain-Akron, Ohio [illegible] m.	Buffalo, N.Y. [illegible]
6. Boston-Cambridge- Worcester, Mass.	3 3	3 3	- 1	- -	- -	2 2	6 9	Hartford-New Haven-New Britain-Waterbury, Conn. 93 m.	New York, N.Y.-[illegible] [illegible]
7. San Francisco-Oakland- San Jose, Calif	4 4	5 5	- 1	- -	- -	2 2	11 12	Sacramento-Stockton-Modesto, Calif. 75 m.	Los Angeles-San [illegible] Corona - [illegible] [illegible]
8. Cleveland-Lorain- Akron, Ohio	4 4	2 2	- -	- -	- -	2 2	8 8	Buffalo, N.Y. 173 m.	Detroit, Mich. [illegible]
9. Washington, D.C.	3	3	-	-	-	2	8	Baltimore, Md. 35 m.	Philadelphia, [illegible] New Jersey [illegible]
10. Pittsburgh, Pa.	4	-	-	-	-	2	6	Cleveland-Lorain-Akron, Ohio 115 m.	Buffalo, N.Y. [illegible]
11. St. Louis, Mo.	3	2	-	-	-	2	7	Indianapolis-Bloomington, Ind. 231 m.	Kansas City, Mo. [illegible]
12. Dallas-Ft. Worth, Texas	3	2	-	-	-	2	7	Houston, Tex. 225 m.	Kansas City, Mo. [illegible]
13. Minneapolis-St. Paul, Minn.	3	1	-	-	-	2	6	Milwaukee, Wis. 299 m.	Chicago, Ill. [illegible]
14. Baltimore, Md	3	2	-	1	-	2	8	Washington, D.C. 35 m.	Philadelphia Pa.-Burlington, N.J. [illegible]

Market	Market Signals Net	Market Signals Ind	Viewing Test Signals Net	Viewing Test Signals Ind	Additional Signals Net	Additional Signals Ind	Total	Two Nearest Top 25 [illegible]	
15. Houston, Tex.	3	1	–	–	–	2	6	Dallas-Ft. Worth, Tex 225 m.	Kansas City, Mo. [illegible]
16. Indianapolis-	3	2	–	–	–	2	7	Cincinnati, Ohio-Newport,	Chicago, Ill. [illegible]
Bloomington, Ind.	3	2	2	–	–	2	9	Ky. 100 m.	
17. Cincinnati, Ohio-	3	1	–	–	–	2	6	Indianapolis-Bloomington,	Cleveland-Lorain-Akron,
Newport, Ky.								Ind. 100 m.	Ohio [illegible]
18. Atlanta, Ga.	3	2	–	–	–	2	7	Cincinnati, Ohio- Newport,	Indianapolis-Bloomington,
								Ky. 369 m.	Ind. [illegible]
19. Hartford-	4	1	–	–	–	2	7	Boston-Cambridge-Worcester,	New York, N.Y.-Linden-
New Haven-	4	1	3	3	–	2	13	Mass. 93 m.	Paterson, N.J. [illegible]
New Britain-	4	1	–	–	–	2	7		
Waterbury, Conn	4	1	3	3	–	2	13		
20. Seattle-	3	2	–	–	–	2	7	Sacramento-Stockton-Modesto,	San Francisco-Oakland-San Jose,
Tacoma, Wash	3	2	–	–	–	2	7	Calif. 624 m.	Calif. [illegible]
[illegible] Miami, Florida	3	2	–	–	–	2	7	Atlanta, Ga. 604 m.	Washington, D.C. [illegible]
22. Kansas City, Mo.	3	1	1	–	–	2	7	St. Louis, Mo. 238 m.	Chicago, Ill. 414 m.
23. Milwaukee, Wis.	3	1	–	–	–	2	6	Chicago, Ill. 89 m.	Indianapolis--Bloomington,
									Ind. [illegible]
24. Buffalo, N.Y.	3	1	–	–	–	2	6	Cleveland-Lorain-Akron,	Detroit, Mich. [illegible]
								Ohio 173 m.	
25. Sacramento-	3	2	–	–	–	2	7	San Francisco-Oakland, San	Los Angeles-San Bernardino-
Stockton-	3	2	–	–	–	2	7	Jose, Calif. 75 m.	Corona-Fontana, Calif. [illegible]
Modesto, Calif.	3	2	–	–	–	2	7		
26. Memphis, Tenn.	3	–	–	–	–	3	6	St. Louis, Mo. 240 m.	Atlanta, Ga. [illegible]
27. Columbus, Ohio	3	–	–	–	–	3	6	Cincinnati, Ohio-Newport,	Cleveland-Lorain-Akron,
								Ky. 100 m.	Ohio [illegible]
28. Tampa-St. Petersburg, Fla.	3	1	–	–	–	2	6	Miami, Fla. 205 m.	Atlanta, Ga. 415 m.

Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 Markets Having [illegible] Station(s); with Mileage [illegible] in Each Market	
	Net	Ind	Net	Ind	Net	Ind		Closest Market	[illegible]
29. Portland, Ore.	3	1	-	-	-	2	6	Seattle-Tacoma, Wash 145 m	Sacramento-Stockton-Modesto, Calif. 4[illegible]2 m.
30. Nashville, Tenn.	3	1	-	-	-	2	6	Atlanta, Ga. 214 m	Cincinnati, Ohio-Newport, Ky. [illegible] m.
31. New Orleans, La.	3	1	-	-	-	2	6	Houston, Tex. 313 m.	Atlanta, Ga. 4[illegible] m.
32. Denver, Colo.	3	1	-	-	-	2	6	Kansas City, Mo 558 m.	Dallas-Ft. Worth, Tex. [illegible] m.
33. Providence, R.I.	3	-	3	2	-	2	10	Boston-Cambridge-Worcester,	Hartford-New Haven-New Britain-
New Bedford, Mass	3	-	3	2	-	2	10	Mass. 41 m.	Waterbury, Conn. [illegible] m.
34. Albany-	3	-	-	-	-	3	6	Hartford-New Haven-New Britain-	New York, N.Y.-Linden-Paterson,
Schenectady-	3	-	-	-	-	3	6	Waterbury, Conn. 82 m.	N.J. [illegible]2 m.
Troy, N.Y.	3	-	-	-	-	3	6		
35. Syracuse, N.Y.	3	-	-	-	-	3	6	Buffalo, N.Y. 138 m.	New York, N.Y.-Linden-Paterson, N.J. [illegible] m.
36. Charleston-	3	-	-	-	-	3	6	Cincinnati, Ohio-Newport,	Cleveland-Lorain, Akron,
Huntington, W.VA	3	-	-	-	-	3	6	Ky. 164 m.	Ohio 217 m.
37. Kalamazoo-	4	1	-	-	-	2	7	Chicago, Ill. 109 m.	Milwaukee, Wis. 129 m.
Grand Rapids-	4	1	-	-	-	2	7		
Muskegon-	4	1	-	-	-	2	7		
Battle Creek, Mich	5	1	2	-	-	2	10		
38. Louisville, Ky	3	1	-	-	-	2	6	Cincinnati Ohio-Newport, Ky. 90 m.	Indianapolis-Bloomington, Ind. 1[illegible] m.
39. Oklahoma City, Ok.	3	-	-	-	-	3	6	Dallas-Ft. Worth, Tex. 190 m.	Kansas City, Mo. [illegible] m.
40. Birmingham, Ala.	3	-	-	-	-	3	6	Atlanta, Ga. 140 m.	St. Louis, Mo. [illegible] m.
41. Dayton-Kettering O.	3	1	2	-	-	2	8	Cincinnati, Ohio-Newport Ky 48 m.	Indianapolis-Bloomington, Ind. 105 m.
42. Charlotte, N.C.	3	1	-	-	-	2	6	Atlanta, Ga 227 m.	Washington, D.C. 33[illegible] m.
43. Phoenix-Mesa, Ariz	3	2	-	-	-	2	7	Los Angeles-San Bernardino-Corona-Fontana, Calif. 357 m.	Sacramento-Stockton-Modesto, Calif 6[illegible] m.

Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 Markets Having [illegible] Station(s); with Air Mileage Between [illegible] Cities in each Market			
	Net	Ind	Net	Ind	Net	Ind		Closest Market		[illegible]	
44. Norfolk-	3	1	-	-	-	2	6	Washington, D.C.	146 m.	Baltimore, Md.	169 m.
Newport News-	3	1	-	-	-	2	6				
Portsmouth-	3	1	-	-	-	2	6				
Hampton, Va.	3	1	-	-	-	2	6				
45. San Antonio, Tex.	3	1	-	-	-	2	6	Houston, Tex	189 m.	Dallas-Ft. Worth, Tex.	252 m.
46. Greenville-	5	-	-	-	-	2	7	Atlanta, Ga	137 m.	Cincinnati Ohio-Newport, Ky.	316 m.
Spartanburg-	5	-	1	-	-	2	8				
Anderson, S.C.	5	-	-	-	-	2	7				
Asheville, N.C.	5	-	-	-	-	2	7				
47. Greensboro-	3	-	-	-	-	3	6	Washington, D.C.	248 m.	Atlanta, Ga.	305 m.
High Point-	3	-	-	-	-	3	6				
Winston-Salem, N.C.	3	-	-	-	-	3	6				
48. Wichita-	3	-	-	-	-	3	6	Kansas City, Mo	177 m.	Dallas-Ft. Worth, Tex.	340 m.
Hutchinson, Kan	3	-	-	-	-	3	6				
49. Salt Lake City, Ut.	3	-	-	-	-	3	6	Sacramento-Stockton-Modesto, Calif.	533 m.	Los Angeles-San Bernardino-Corona-Fontana, Calif.	579 m.
50. Wilkes-Barre-	3	-	-	-	-	3	6	New York, N.Y.-Linden-Paterson, N.J.	98 m.	Philadelphia, Pa-Burlington, N.J.	104 m.
Scranton, Pa.	3	-	-	-	-	3	6				
51. Little Rock, Ark.	3	-	-	-	-	2	5	St. Louis, Mo.	291 m.	Dallas-Ft. Worth, Tex.	293 m.
52. San Diego, Calif.	3	1	1	1	-	2	8	Los Angeles-San Bernardino-Corona-Fontana, Calif.	112 m.	San Francisco-Oakland-San Jose, Calif.	458 m.
53. Toledo, Ohio	3	-	2	-	-	2	7	Detroit, Mich.	53 m.	Cleveland-Lorain-Akron, O.	[illegible] m.
54. Omaha, Neb.	3	-	-	-	-	2	5	Kansas City, Mo.	166 m.	Minneapolis-St. Paul, Minn.	[illegible]
55. Tulsa, Okla.	3	-	-	-	-	2	5	Kansas City, Mo	216 m.	Dallas-Ft. Worth, Tex.	235 m.
56. Orlando-Daytona Bch., Fla.	3	-	-	-	-	2	5	Miami, Fla.	204 m.	Atlanta, Ga.	421 m.
57. Rochester, N.Y.	3	-	-	-	-	2	5	Buffalo, N.Y.	67 m.	Cleveland-Lorain-Akron, O.	239 m.
58. Harrisburg-	5	-	-	-	-	2	7	Baltimore, Md.	68 m.	Philadelphia, Pa.-Burlington, N.J. or Washington, D.C.	94 m.
Lebanon-	5	-	-	-	-	2	7				
Lancaster-	5	-	3	1	-	2	11				
York, Pa.	5	-	3	-	-	2	10				

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Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 Markets Having [illegible] Station(s); with Air Mileage Between [illegible] Cities in each [illegible]			
	Net	Ind	Net	Ind	Net	Ind		Closest Market		[illegible]	
59b Texarkana, Tex.-Shreveport, La.	3	1	-	-	-	2	6	Dallas-Ft. Worth, Tex.	166 m.	Houston, Tex.	[illegible] m.
60. Mobile, Ala-	3	-	-	-	-	2	5	Atlanta, Ga.	283 m.	Houston, Tex.	490 m.
Pensacola, Fla	3	-	-	-	-	2	5				
61. Davenport, Iowa-Rock Is.-Moline Ill	3	-	-	-	-	2	5	Chicago, Ill	151 m.	Milwaukee, Wis.	[illegible] m.
62. Flint-	3	-	4	1	-	2	10	Detroit, Mich.	57 m.	Cleveland-Lorain-Akron, O.	[illegible] m.
Bay City-	3	-	-	-	-	2	5				
Saginaw, Mich.	3	-	-	-	-	2	5				
63. Green Bay, Wis.	3	-	-	-	-	2	5	Milwaukee, Wis.	102 m.	Chicago, Ill.	[illegible] m.
64. Richmond-	3	-	-	-	-	2	5	Washington, D.C.	97 m.	Baltimore, Md.	129 m.
Petersburg, Va	3	-	-	-	-	2	5				
65. Springfield-Decatur	5	-	-	-	-	2	7	St. Louis, Mo.	86 m.	Chicago, Ill.	173 m.
Champaign-Jacksonville, Ill	5	-	3	1	-	2	11				
66. Cedar Rapids-	3	-	-	-	-	2	5	Chicago, Ill.	225 m.	Milwaukee, Wis.	[illegible]
Waterloo, Iowa	3	-	-	-	-	2	5				
67. Des Moines-Ames, Iowa	3	-	-	-	-	2	5	Kansas City, Mo.	180 m.	Minneapolis-St. Paul, Minn	[illegible] m.
68. Jacksonville, Fla.	3	-	-	-	-	2	5	Atlanta, Ga.	285 m.	Miami, Fla.	[illegible] m.
69. Cape Girardeau, Mo.-Paducah, Ky.-Harrisburg, Ill.	3	1	-	-	-	2	6	St. Louis, Mo.	115 m.	Indianapolis-Bloomington, Ill.	[illegible] m.
70. Roanoke-	4	-	-	-	-	2	6	Washington, D.C.	196 m.	Baltimore, Md.	[illegible] m.
Lynchburg, Va.	4	-	-	-	-	2	6				
71. Knoxville, Tenn.	3	-	-	-	-	2	5	Atlanta, Ga.	155 m.	Cincinnati, Ohio-Newport, Ky.	[illegible] m.
72. Fresno, Calif.	3	1	-	-	-	2	6	Sacramento-Stockton-Modesto, Calif.	158 m.	San Francisco-San Bernardino-Corona-Fontana, Calif.	161 m.
73. Raleigh-	2	1	-	-	2	2	7	Washington, D.C.	233 m.	Baltimore, Md.	267 m.
Durham, N.C.	2	1	1	-	1	2	7				

Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 Markets Having Independent Station(s); with Air Mileage Between Principal Cities in each Market			
	Net	Ind	Net	Ind	Net	Ind		Closest Market		Next Closest Market	
74. Johnstown-	3	-	2	-	-	2	7	Baltimore, Md., or Washington,		Cleveland-Lorain-Akron,	
Altoona, Pa.	3	-	-	-	-	2	5	D.C.	142 m.	Ohio	166 m.
75. Portland-Poland	3	-	-	-	-	2	5	Boston-Cambridge-Worcester,		Hartford-New Haven-New Britain-	
Springs, Me.								Mass.	99 m.	Waterbury, Conn.	179 m.
76. Spokane, Wash.	3	-	-	-	-	2	5	Seattle-Tacoma, Wash	229 m.	Sacramento-Stockton-Modesto,	
										Calif.	559 m.
77. Jackson, Miss.	3	-	-	-	-	2	5	Atlanta, Ga.	351 m.	Houston, Tex.	352 m.
78. Chattanooga, Tenn.	3	-	-	-	-	2	5	Atlanta, Ga.	103 m.	Cincinnati Ohio-Newport,	223 m.
										Ky.	
79. Youngstown, Ohio	3	-	-	-	-	2	5	Cleveland-Lorain-Akron,	61 m.	Detroit, Mich.	150 m.
								Ky.			
80. South Bend-	3	-	-	1	-	2	6	Chicago, Ill	73 m.	Milwaukee, Wish	127 m.
Elkhart, Ind.	3	-	-	-	-	2	5				
81. Albuquerque, N.M.	3	-	-	-	-	2	5	Dallas-Ft. Worth, Tex	588 m.	Los Angeles-San Bernardino-	
										Corona-Fontana, Calif.	655 m.
82. Fort Wayne-Roanoke,	3	-	-	-	-	2	5	Indianapolis-Bloomington,		Cincinnati Ohio-Newport,	
Ind.								Ind.	105 m.	Ky.	140 m./3
83. Peoria, Ill	3	-	-	-	-	2	5	Chicago, Ill	143 m.	St Louis, Missouri.	145 m.
84. Greenville-	3	-	-	-	-	2	5	Washington, D.C.	280 m.	Baltimore, Md.	310 m.
Washington-	3	-	-	-	-	2	5				
New Bern, N.C.	3	-	-	-	-	2	5				
85. Sioux Falls-	3	-	1	-	-	2	6	Minneapolis-St. Paul, Mo.	198 m.	Kansas City, Mo.	327 m.
Mitchell, S.D.	3	-	-	-	-	2	5				
86. Evansville, Ind.	3	-	-	-	-	2	5	Indianapolis-Bloomington,		St. Louis, Mo.	155 m.
								Ind.	145 m.		
87. Baton Rouge, La	2	-	-	-	3	2	7				

Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 Markets Having [illegible] Station(s); with Air Mileage Between Principal Cities in each Market			
	Net	Ind	Net	Ind	Net	Ind		Closest Market		[illegible]	
88. Beaumont-Port Arthur, Tex.	3	-	-	-	-	2	5	Houston, Tex.	79 m.	Dallas-Ft. Worth, Tex.	245 m.
89. Duluth-Superior, Minn.	3	-	-	-	-	2	5	Minneapolis-St. Paul, Minn.	136 m.	Milwaukee, Wis.	331 m.
90. Wheeling, W.Va.-	2	-	3	-	-	2	7	Cleveland-Lorain-Akron, Ohio	111 m.	Detroit, Mich.	198 m.
Steubenville, Ohio	2	-	3	1	-	2	8				
91.[b] Lincoln-	3	1	3	-	-	2	9	Kansas City, Mo.	164 m.	Minneapolis-St. Paul, Minn.	336 m.
Hastings-	3	1	-	-	-	2	6				
Kearney, Neb.	3	1	-	-	-	2	6				
92. Lansing-	2	-	3	-	-	2	7	Detroit, Mich.	82 m.	Chicago, Ill.	169 m.
Onondaga, Mich	2	-	3	-	-	2	7				
93. Madison, Wis.	3	-	-	-	-	2	5	Milwaukee, Wis.	75 m.	Chicago, Ill	123 m.
94. Columbus, Ga.	3	-	-	-	-	2	5	Atlanta, Ga.	95 m.	Cincinnati Ohio-Newport, Ky.	4[illegible] m.
95. Amarillo, Tex.	3	-	-	-	-	2	5	Dallas-Ft Worth, Tex.	334 m.	Kansas City, Mo.	461 m.
96. Huntsville-	3	-	-	-	-	2	5	Atlanta, Ga.	143 m.	Cincinnati Ohio-Newport, Ky.	322 m.
Decatur, Ala.	3	-	1	-	-	2	6				
97. Rockford-	3	-	-	-	-	2	5	Chicago, Ill.	80 m.	Milwaukee, Wisc.	81 m.
Freeport, Ill	3	-	1	-	-	2	6				
98. Fargo-Grand Forks-Valley City, N.D.	3	-	-	-	-	2	5	Minneapolis-St. Paul, Minn.	214 m.	Milwaukee, Wisc.	559 m.
99. Monroe, La-	2	1	-	-	1	2	6	Houston, Tex.	270 m.	Dallas-Ft Worth, Tex.	273 m.
El Dorado, Ark.	2	1	3	-	-	2	8				
100. Columbia, S.C.	3	-	-	-	-	2	5	Atlanta, Ga.	194 m.	Cincinnati Ohio-Newport, Ky.	401 m.

Explanatory Notes:

[a] Market includes a foreign station

[b] Indicates there is a non-operational station in the market with a construction permit less than 18 months old.

STATEMENT OF GEORGE J. BARCO, GENERAL COUNSEL, PENNSYLVANIA CABLE TELEVISION ASSOCIATION

Mr. Chairman, Members of the Subcommittee, I am George J. Barco. For the past 17 years, I have served as General Counsel of Pennsylvania Cable Television Association. Pennsylvania is the state in which the cable television industry started, and there are some 300 CATV systems operating in over 1,100 communities—more than in any other state in the nation—serving over 2,000,000 television viewers. It has been my privilege to serve as National Chairman (then known as President) of National Cable Television Association, and I was a member of its Board of Directors for 15 years. For the past year, I have served as member of the NCTA Copyright Committee. Also, for the past 20 years, I have been, and still am, a part owner and the president of several cable television companies.

By way of further introduction, I believe I should state a disclaimer, for the benefit of NCTA, and for the information of the Committee, that while I have been an active participant in the affairs of NCTA over the years, the views I am about to express on the copyright issue are my own, and in many respects do not correspond with the officially adopted views of NCTA as an organization. At the same time, let me state that I believe my views reflect those of many, many cable operators all over the country. There is no single matter which has concerned the CATV industry for the past 7 to 8 years more than copyright. Over this period, I have talked on a person-to-person basis with literally hundreds of cable operators and virtually every industry leader on the subject.

Let me state finally by way of introduction that I view my task today as awesome and the situation for the cable industry as critical, if not desperate. In the circumstances, I can only state the situation as I see it fully and frankly to the Committee, without regard to certain existing predilictions, interests and objectives among the forces interacting on the copyright issue, within and without NCTA. I am very appreciative for this opportunity of doing so.

In October, 1968, the Board of Directors of the Pennsylvania Association, following a careful consideration of the copyright issue, adopted what has been termed as the "Pennsylvania Position" on copyright. Its underlying principle is simply that television signals received "off-the-air" should not be subject to the payment of copyright fees so long as similar payments do not apply to reception by conventional antennas. The Position recognizes that copyright fees should be payable for copyrighted programs received by microwaving or similar long distance transportation, and that such microwaving should be subject to regulation in view of its impact on television broadcasting, copyright property rights, and the interrelated market patterns of both.[1]

While recognizing the legitimate interests of many who are interested in providing direct television program services, and a variety of other communication services in the metropolitan area by cable, the Pennsylvania Position urges that the television reception function for "off-the-air" signals by CATV should not be colored by the possible future developments of cable television, nor should the inherent rights in such reception be traded as a part of any compromise between the conflicting interests concerned in large city cable television development.

The Pennsylvania Position has received wide support in the industry throughout the nation for it was grounded on the basic concept and fact of CATV performing the community antenna reception function for signals received "off-the-air". Further, it seemed incomprehensible that liability to copyright fees should depend on the accident of topography—or in the real life situation of the television viewer—whether he was living in the high area where a conventional antenna did the job, or whether he lived behind the hills or along the river where community antenna service was required or desirable to provide satisfactory television reception. How could there be any justification for requiring the subscribers to make an additional payment to the copyright owner who had already received payment in his contractual arrangements for the broadcasting, paid ultimately by the television viewers—including CATV subscribers—in the advertising costs of purchased products? Besides, until recently the copyright owners made repeated public assurances that they were not interested in payments related to such television reception services, but were interested in only the large city markets where distant signals were to be imported.

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[1] Under the Pennsylvania Position, no copyright fees should be payable on reception provided of three stations, with the three major networks, and one independent station, whether the signal is received "off the air" or by microwave, in the interest of all members of the public receiving minimum television service.

And most important of all, the Supreme Court of the United States in the *United Artists* case made a determination, in June, 1968, recognizing and establishing in legal terms the concept always understood by cable men in practical terms by the very nature of their operations.

Yet, in the intervening years from 1968, the membership of National Cable Television Association was sharply divided on the copyright issue. One segment considered any payment of copyright fees for signals received "off-the-air" an infringement of very basic rights, for the reasons just mentioned. The other segment viewed payment of copyright "across the board" as the only realistic means for securing importation of distant signals thought to be necessary for the economic viability of cable television for the large cities if and when such system construction occurs.

To fully understand the circumstances of this division, it must be understood that the membership of NCTA is not a homogeneous group; and that while all members of NCTA are in the cable industry, a substantial number of them—and particularly some large multiple system owners—also have other interests which are at variance with CATV interests as such, as, for example, television broadcasting and copyright interests. It is not surprising that the persuasions of the copyright payment segment within NCTA have been weighted and influenced by these interests and still are today.

As is well known, the event of decision came in November, 1971, in the context of the Office of Telecommunications Policy Compromise, which was approved by the NCTA Board of Directors because it appeared to represent the only available basis upon which there was any possibility for removing the Federal Communications Commission freeze on cable television development, ~~particularly in the~~ large markets.

Whatever differences there may have been within NCTA over philosophy as related to the regulatory scheme and the payment for copyright, I can state I believe that every possible effort was made by the NCTA Copyright Committee, and others of the CATV industry concerned with the implementation of this decision, to accommodate to the situation. I can state from my own personal knowledge that the attitude, demands and conduct of those representing the movie copyright owners during the sessions which I attended were such that all efforts to deal with them were vigorous exercises in futility.

The representatives of these copyright owners were completely uninformed as to the nature of CATV operations, their financial aspects and the specific current problems facing the industry; and they were evidently determined to maintain their ignorance on these matters. Furthermore, they displayed a callous disregard of the consequences of their exorbitant and totally unrealistic demands. Thus, when they were informed that our industry simply could not pay the demanded 16% fees for movies alone, added to fees proposed for music and other copyright of over 12%, the response was a blatant "pass it on to the subscribers and tell them it is a cost of doing business."

When we attempted to cite the absolute and practical limitations to service charge increases, by way of clearances through the municipalities on whose franchises the operation must depend, and by way of the business fact that subscribers either could not—or would not—make such payments, the blunt rejoinder was "just pass it on to the subscribers anyway."

I must observe that the FCC, in insisting on copyright payment as one of the conditions to the easing of restrictions on CATV growth, placed a perhaps unforeseen, but nonetheless, tremendous pressure on the CATV representatives in the bargaining process. The copyright owners were under no concomitant burden, and, in fact, they maximized their advantage by insisting, in effect, that this condition amounted to a requirement that CATV settle on the terms of the copyright owners. In the end, it was painfully clear to even the most optimistic and the most tolerant of those representing NCTA that fair, realistic and responsible dealing with the copyright owners had been and is an utter impossibility.

Gentlemen, I put aside completely my firm conviction that copyright payment for the reception of television signals received "off-the-air" is wrong in principle and discriminatory in effect. I address myself now to the consequences of the imposition of copyright payments which this industry simply cannot afford to pay on its growth, development, and, yes, its survival. Let me capsulize the difficulties of cable television operations today.

Of course, like all other business, we are plagued with increased costs incident to the inflationary period in which we are living. Substantial basic costs like pole attachment fees currently are being increased from 40% to 70% across the nation. FCC technical standards will require great expenditures in system rebuilding in the next several years with correspondingly increased operating costs. Compulsory cablecasting is still a requirement for systems over 3,500 and operating costs for even a modest operation run into tens of thousands of dollars annually.

As against this spiraling of costs, there is a definite and absolute limit in the possibilities for service charge increases, either because approval cannot be secured from the municipality or other franchising authority, or because the market conditions will not support the increases, or for both reasons. At the same time, there are converging interests by state and local governmental units seeking control, restraints and services—sometimes duplicative, sometimes inconsistent—all exacting upon the total resources of the cable industry.

Added to these problems of existing systems, new systems have the added burdens of the staggering costs and special difficulties of system construction and operation in the large and metropolitan city areas, and the feasibility and acceptance of CATV service in such areas are yet to be established. The experiences to date in the New York City and Akron, Ohio, systems are instructive on the vicissitudes and hazards of such ventures.

The Committee is being furnished with specific data on the overall financial capacity of the industry. It is my sincere and firm opinion that even without copyright payment, the industry is entering into a tight squeeze situation in which it will have real difficulties to "hold its own," let alone to develop and grow. Against these present day industry conditions, it is left for this Commission to deal with copyright in terms of the consequences, something the copyright owners refuse to do.

I respectfully submit that a proper concern for the interests of the subscriber as a consumer demand that no copyright payment should be imposed which cannot be absorbed by the industry, without passing the copyright charges to the charges to the subscriber.

Aside from the fact that for reasons indicated it may not be possible for these charges to be passed on, it is unthinkable that the copyright owners should, in effect, come into the very homes of the subscribers to secure additional payment just because reception is being provided through a wired system. Furthermore, the disturbing fact is that in all of the deliberations within NCTA, in all of the negotiations with the copyright owners, in all of the hearings and discussions with the FCC, the subscriber has never been independently represented; and he has never had an opportunity to be heard. I am confident that this Committee will act with due regard to the subscriber's interest, in keeping with the enlightened present-day concerns for the consumer who in the end supports the entire enterprise.

Further, I respectfully submit that a proper concern for the future growth and development of cable television and the services it can provide to the public, demands that any copyright payment should be such that payment does not restrain, impede or burden the industry's growth and development.

Nothing could more surely restrain cable's growth than the prospect to investors that the possibilities for recovery of capital and a reasonable profit incident to the risks would always be subject to the vagaries and inordinate demand of the copyright owners, who are, of course, not subject to any direct governmental regulation.

And this industry must have the resources to do the research, the experimentation and development which are necessary to transform the great expectations for it into realization. I am pleased to report that up to this time there has been positive progress toward that realization.

Let me cite two examples. In Pennsylvania alone, following substantial expenditures in time, money and effort for development and experimentation—which time today does not permit me to detail—there are now some 53 systems conducting regular cablecasting operations with a system for interchange of tapes by bicycling. In this project, state government reports and political campaigning for United States senatorial, gubernatorial and other statewide offices have been provided for over one-half million homes. Arrangements have just been completed for the production of a regular report program for the United States senators and representatives at Washington on the three-fourths inch format which will be available for timely distribution throughout the systems.

The other example is a further development from this bicycling effort and is in the serious planning stage. The project will take advantage of our beautiful

Pennsylvania hills where it all started by using them as a resource for sites to provide a statewide microwave network which would link all of the cable television systems (and school district educational centers where there are no CATV systems) for three channels of educational programming for all of the people in Pennsylvania under the direction of the Department of Public Education. The prospect is an exciting and attainable one, but we know that the cable participants as a group will have to provide a substantial portion of the capital costs for the execution of the project.

With particular relation to the CATV copyright legislation presently under consideration, I am most appreciative of the efforts and concerns of which it is a product. At the same time, I believe in view of the changing circumstances since the legislation was first proposed, it would not be inappropriate for me to express to the Committee certain basic matters which I believe should receive further specific consideration.

(1) The compulsory license should extend to reception service of all signals received "off-the-air".

In addition to the basic facts and principles which support this treatment, noted earlier, it should be observed that the copyright owners utilize the great public resource of the radio and television spectrum without charge. If the copyright owners choose to make use of the tremendous capability of this resource for mass dissemination of their products, with corresponding increased coverage and return, it is wholly unreasonable and unjustifiable for them to insist on all the benefits of broadcasting and yet maintain the same control as if they had provided their own contained arena or exhibition hall.

(2) The copyright fee for reception service of signals received "off the air" should be maximum of 1% to 2% and should be fixed statutorily.

For reasons indicated, there is really no justification for any copyright payment for signals received "off-the-air," and this payment should be kept at a minimum in view of the financial circumstances of the industry and the plain fact that to the extent of any such payment, there must be a corresponding reduction in the capability of the industry for research, development and growth. At all events, this rate of payment should be fixed by statute, so that at least with regard to this basic television reception service, the industry may have financial stability for the long growth requirements ahead.

(3) The copyright fee for reception service provided of distant signals transported by microwave should be established initially at one-tenth of 1% per channel, this fee being subject to adjustment after an initial three year period by a negotiation procedure between the parties, or in the event of disagreement, by arbitration.

(4) In our view, arbitration is a wholly inappropriate and unsatisfactory procedure for establishing copyright fees for basic television reception service of signals received "off-the-air."

For such a determination, arbitration is an inexact and uncertain process with no established guidelines or criterion upon which a sound decision can be made. The continued survival and well-being of the industry should not be left to the chance and power plays which are the only certain operating factors in the process under the circumstances. The public interest in the premises, and particularly in the growth of cable television, demands a degree of direct accountability in the legislative process which establishes the copyright in the first place, particularly since copyright owners have no commitment to the industry or its future.

On the other hand, providing reception of distant signals transported by microwave or otherwise, being a matter of choice and a calculated risk for the CATV companies that choose to do so, is properly subject to a bargaining process or for the ultimate arbitration arrangement. The market considerations for both the copyright owners and the CATV industry in these "extra services" should make the industry negotiations a more balanced and effective process.

(5) There should be no exemption of copyright fees for any system on the basis of size.

I know of no justification either in terms of costs or otherwise for different treatment between systems based on size or among subscribers based on the size of the system from which they are served. Any exemption, instead of being based on size, should be based upon an exemption for all systems in terms of gross receipts, as, for example, an exemption for the first $200,000.00 of gross receipts from an integrated system operation, or some other appropriate operational unit. Further, gross receipts should be very specifically and clearly defined to include only receipts for reception service provided of broadcasted signals and should not include receipts attributed to local origination, direct program services, auxiliary services, and the like.

(6) There should be no exemption of copyright fees for any system based on the ownership and operating entity being a governmental body or non-profit organization, or because the system is a part of a hotel, motel, apartment or like operation.

(7) An exemption or credit should be provided by way of an incentive to the development of cablecasting and local program originations.

One possibility is an exemption from gross receipts in the maximum amount of $50.000.00 for direct personnel and material costs incurred in such program productions. Another is a credit against the copyright fees based on a percentage of direct personnel and material costs incurred in such program productions.

Senator McClellan, and Members of this Committee: Everyone believes that the cable industry has a great potential for many new services for the people of our nation. No one is more certain of this than those of us who have nurtured the industry to its present status.

To fulfill the many promises of cable, we of the cable industry are willing to make a fair and reasonable accommodation on copyright for even off-the-air reception! In my opinion, the copyright owners have been, and apparently still are, unable to be properly concerned with the financial problems of our industry; we, therefore, earnestly request that your committee carefully study all of the relevant circumstances, in order that your final determination will make it possible for our industry to have the financial stability to properly develop our capabilities for service for the people of our country.

[Afternoon session, 2:05 o'clock, Wednesday, August 1, 1973.]

Senator McClellan. The committee will come to order.

Counsel, you may call the first witness for the afternoon session.

Mr. Brennan. Mr. Chairman, the first issue for the afternoon session is the proposed religious broadcasting exemption, which appears in section 112(c) of the bill. To facilitate the reading of the record, I request that the text of 112(c) be printed at this point in the record.

Senator McClellan. Very well.

That may be done.

[The material referred to follows:]

S. 1361

* * *

§ 112. Limitations on exclusive rights: Ephemeral recordings

* * *

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord for each transmitting organization specified in clause (2) of this subsection of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are

all destroyed within one year from the date the transmission program was first transmitted to the public.

* * *

Mr. BRENNAN. To testify in opposition to this provision, we have the counsel of SESAC, Mr. Albert F. Ciancimino.

STATEMENT OF ALBERT F. CIANCIMINO, COUNSEL, SESAC, INC.

Mr. CIANCIMINO. Thank you, Mr. Brennan.

Mr. Chairman, in the relatively short time allotted, I shall try to summarize the reasons supporting our position that section 112(c) of S. 1361 should be totally deleted.

With regard to the legislative history of 112(c), it first appears on the scene as late as February 8, 1971, with the introduction of S. 644 by the chairman of this subcommittee. It was not included in any prior legislation nor was it the subject of any study by the Copyright Office nor any other governmental or nongovernmental body, nor to my knowledge was such a provision ever contemplated by any legislative or administrative body until shortly before February 8, 1971.

Just about every significant section of S. 1361 has been the subject of intense study and analysis; not so with 112(c). Lo and behold, in 1971 without any prior notice or knowledge on the part of those representing the interests of copyright proprietors of music, it sprang into existence and became part of the copyright revision bill.

Prior to today, there has never been any testimony at any prior hearings concerning the merits or pitfalls of this subsection. I therefore urge this subcommittee to weigh carefully the following reasons why 112(c) should not be enacted into law.

Section 112(c) would exempt from infringement the making by a nonprofit organization of no more than one copy or phonorecord of broadcast programs containing nondramatic musical works of a religious nature for use in a single broadcast by a licensed broadcaster. In short, it places a limitation upon the copyright proprietor's right to mechanically reproduce the work, which to my knowledge, does not appear in prior case law or statute. There is no precedent for limiting the creator's rights in the area of mechanical reproduction of his work just because of the type of work he creates.

The current copyright law in section 1(e) clearly grants to the copyright proprietor the exclusive right to make "any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

Several things are immediately clear from this language. First, there was no intention on the part of Congress at the time section 1(e) was enacted to in any way limit the copyright proprietor's right in the form of recording because of the type of work which the copyright proprietor creates, for example, a religious work.

Second, there was no intention on the part of Congress to limit the author's right to certain kinds of recording, since the statute states "any form of recording" and these are not words of limitation but rather words of all inclusiveness. It would clearly refer to not only phonorecord, but also any type of magnetic tape or other reproduction of the musical composition.

To the extent therefore that the National Religious Broadcasters Association has circulated a nonlegal position which states in part that "The Copyright Law of 1909 on which SESAC's claims are based, does not refer at all to magnetic tapes since these did not come into existence until much later," we submit that such a nonlegal position is both misleading and inaccurate.

Proponents of 112(c) have also asserted that they are paying twice for the same copyrighted music. We heard about the two tickets to the one performance this morning. They claim this since the copyright proprietor receives performance fees as well as mechanical reproduction fees.

It is clearly stated in copyright law that the right to mechanically reproduce is a distinctly separate right from the other rights granted copyright owners. The issuance of a performance right license does not therefore, in and of itself, grant to the licensee the right to mechanically reproduce. Conversely, a license to mechanically reproduce does not carry with it the right to perform the work.

Now, Mr. Chairman, I have submitted citations in my prepared statement to support those statements.

Senator McCLELLAN. Very well.

Mr. CIANCIMINO. Further, the mechanical reproduction license is issued to and the fee paid by the program producer. The performance of the program comes within the scope of the broadcaster's performance license agreement and is paid for by the broadcasters—so that you have two completely independent rights being paid for by two completely independent people: one for the right for mechanical reproduction and the other for the right to perform.

It is therefore somewhat misleading for the proponents of 112(c) to allege that they are paying twice for the same music.

With regard to the structure of 112(c) itself, we submit that it is unclear, ambiguous, and will, if enacted, be the cause of extended litigation. Section 112(c) exempts a work of a religious nature. The term "work of a religious nature" is of extraordinary breadth. There is no definition in the statute of such a term and indeed it may very well be impossible to come up with a meaningful definition

Must a song refer to God or a supernatural being to be of a religious nature? Can a composition extolling the virtues of nature be considered a religious composition? A theme which simply fosters the concept of clean living and moral value, can this be a work of a religious nature?

It would seem that whether a musical work is of a religious nature in many instances will be, not in the eyes of the beholder, but most certainly, in the ears of the listener.

Further, subsection (c) refers to a "musical work of a religious nature or of a sound recording." It would therefore appear to apply to any sound recording which meets the subsequent conditions of the section regardless of whether or not the musical work is of a religious nature. Again, the lack of prior study and analysis is evident.

I am rather certain that this subcommittee does not intend to apply 112(c) to all musical compositions regardless of nature. This I have gathered from the announcement of the copyright office and introductory remarks of the chairman when S. 644 was introduced in 1971, and which referred to works of a religious nature.

Finally, there is no definition of the term "transmitting organization." There are definitions of "transmission program" and "transmit" but not for a "transmitting organization." Query: does it include a satellite? Is it limited only to radio and television stations? These are all questions that are left open.

These are the criticisms of the structure of 112(c), which I hope will become immaterial when this subcommittee has fully evaluated the issues involved and has deleted the section in its entirety. There is absolutely no justification for this section 112(c) exemption from copyright infringement which in effect treats the creator of religious works as a second-class citizen.

One who creates a religious copyright and desires to live from the profits gained therefrom has the same expenses as one who creates a nonreligious copyright. He must pay the same amount for a loaf of bread or a bottle of milk.

Why then the distinction in allowing the author of a nonreligious work a broader earning base than the creator of a religious copyright? Why allow a program producer to distribute 4,000 copies of taped programs to broadcasters throughout the country, that is one to each broadcaster, without payment being made to those creators whose religious music is being used?

With Public Law 92-140, this Congress in 1971 has expanded the area of copyright protection, as it relates to the right to reproduce sound recordings, when it passed what is commonly referred to as the antipiracy legislation. The protection accrues to the benefit of the company that owns the physical sound recording itself and guards against its unauthorized duplication. It covers all sound recordings, not just sound recordings of works of a nonreligious nature.

It does seem somewhat incongruous and unjust to extend such a right to a person other than the author in sound recordings of a religious nature while at the same time enacting 112(c) which would limit the author's right to mechanically reproduce the work if it be of a religious nature.

We agree with the antipiracy legislation. In fact, as chairman of committee 301 of the American Bar Association, I had the pleasure of sponsoring a resolution which was ultimately passed by the American Bar Association in favor of such an extension of copyright.

I can only hope that this subcommittee will recognize the contradiction and inconsistency of 112(c) which would limit, dilute, and erode the copyright proprietor's rights. Again, why should the author of a religious work be treated as a second-class citizen?

As a member of committee 304 of the ABA, I would like to advise the subcommittee that committee 304 has passed the following resolution which it will submit to the American Bar Association at its annual meeting in Washington next week:

> *Resolved*, That the section of Patent, Trademark and Copyright Law opposes in principle any statutory limitation which would exempt from infringement the making by a non-profit organization of recordings of broadcast programs containing non-dramatic musical works of a religious nature for use in a single broadcast by a licensed broadcaster.

Senator McCLELLAN. Your time has expired, but you may continue for a couple of minutes.

Mr. CIANCIMINO. Thank you, Mr. Chairman.

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Specifically, the section of patent, trademark, and copyright law opposes in its entirety section 112(c) of S. 1361.

I am pleased to report that on July 17, 1973, in Chicago, the above resolution was approved by the council of the patent, trademark, and copyright law section subject to ratification by the section at the annual meeting. Once approved by council, it is fair to say that it is virtually assured of passage as an ABA resolution next week.

Mr. Chairman, I would like to submit as part of my written statement letters from 23 outstanding publishers of gospel and sacred music asking this subcommittee to delete section 112(c). I would also like to take a few moments at this time to read the following brief letters, some in part endorsing our position.

Senator McClellan. Would you not like to have those letters printed in the record, or excerpts?

Mr. Ciancimino. Yes, Mr. Chairman. I would, however, like to read brief excerpts from them at this time.

> "From the Harry Fox Agency, we agree with the positions of SESAC that inclusion of Section 112(c) of S. 1361 would be detrimental and contrary to the legitimate interests of publishers and others," Albert Burman.

From the National Music Publishers Association, and again, these are publishers that go far beyond the scope of religious music, Mr. Chairman.

> "The National Music Publishers Association agrees with the position taken by SECAC concerning Section 112(c) of S. 1361." Leonard Feist.

From the Music Publishers Association:

> At a board meeting of this association on April, the following resolution was passed unanimously.
>
> "Resolved that MPA supports the SESAC in its efforts to eliminate the proposed exemption for the making of copies of tapes of religious broadcasters."

From the Church Music Publishers Association:

> This letter is to certify that the Church Music Publishers Association proudly endorses the position of Mr. Albert F. Ciancimino on the total deletion of Section 112(c) of the bill, S. 1361.

From BMI:

> Although the supporters of proposed Section 112(c) are undoubtedly well intentioned, it is relatively apparent that they have not studied the existing copyright law, its history or the proposed revision in its entirety. Clearly, there is no justification for the imposition of those limitations contained in Section 112(c)—Edward Cramer.

From ASCAP:

> I have been authorized by the American Society of Composers, Authors, and Publishers on behalf of its members, who advise you that they join the writers and publishers of religious works that you represent in opposing enactment of Section 112(c) of S. 1361.—Herman Finkelstein.

From the American Guild of Authors and Composers:

> Together with the members of the music industry, we have sought to have enacted a revision of the existing copyright act, which would expand the benefits of copyright act, which would expand the benefits of copyright protection to our 3,000 members. It is for this reason that we wish to record our opposition to Section 112(c) of S. 1361, and to associate ourselves with the remarks of Mr. Albert F. Ciancimino—by Mr. Ervin Drake.

Senator McClellan. Can you place the rest of it in the record?

Mr. Ciancimino. There's one more, Mr. Chairman.

Senator McClellan. All right.

Mr. CIANCIMINO. From the International Gospel Publishers Association:

> As attorney for the International Gospel Publishers Association, I wish to go on record on behalf of the association as being emphatically opposed to any copyright provision granting religious broadcasters any exemptions for the paying of performance or mechanical rights pursuant to the Copyright Act of the United States.
>
> Specifically, we are opposed to the proposed copyright amendments contained in Senate bill 644, and 112(c)—Mr. David Ludwig.

In conclusion, Mr. Chairman, I ask this subcommittee to consider and weigh the practical necessities for such an exemption against the far-reaching and negative effects which it will have, not only on trade industry practice as it currently exists, but on the unwarranted dilution of the rights originally granted to the copyright proprietor by Congress in 1909.

Only by allowing the copyright proprietor of religious works equal rights and an equal opportunity to earn a living, will we continue to enjoy the kind of music which has contributed to and hopefully will continue to contribute to the moral fiber of our great country.

Thank you, Mr. Chairman.

Senator MCCLELLAN. I just want to ask you one question. I want to see if I can focus very sharply upon the issue here by this illustration.

Reverend Billy Graham, an internationally known minister, holds many meetings where his sermon, in fact, the whole service is recorded. In such a service, no doubt they do sing hymns, that are copyrighted, play music that is copyrighted; is that correct?

Mr. CIANCIMINO. Yes, they do.

Senator MCCLELLAN. Now, what you are objecting to is or what you are insisting upon is that if a recording is made at the time of the original program and that recording is sent to another station later to be replayed and rebroadcast, then if I understand you, you say that the composer, or proprietor of a song that may have been sung in that service is entitled to a copyright fee.

Mr. CIANCIMINO. That is correct, Mr. Chairman. In fact what happens is Mr. Graham will syndicate programs in which he is using copyrighted music to many stations.

Senator MCCLELLAN. Now, does he pay a copyright fee on it originally when they are singing it? He is holding a service here and they sing "Rock of Ages" or something, which is copyrighted, at that time is a copyright fee earned, or is it payable?

Mr. CIANCIMINO. Here, Mr. Chairman, we are speaking of a performance fee for the initial performance of the work.

Senator MCCLELLAN. That's right. Initially, in the service, they sing a song that has been sold and is copyrighted?

Now, no copyright fee attachments are legally levied against that if he sings from a book that is copyrighted?

Mr. CIANCIMINO. In the performance there, Mr. Chairman, there is a for-profit limitation; in other words, a public performance has to be for profit, as specified in the copyright law.

Senator MCCLELLAN. They take up a collection sometime.

Mr. CIANCIMINO. That is very true, and they charge admission many times. It depends on the preacher involved. Whether or not it is for profit, of course, is many times questionable. And it is our position as a performing rights organization that if they are paying for their musical accompaniment and for the stadium and for whatever other material they need to put on that performance; then it is a performance for profit.

Senator McClellan. Now, let me see if I can get this so I can understand this, at least. Billy Graham comes to Washington, D.C., goes out here in the stadium and puts on a series of meetings, at which they sing religious hymns, hymns that are copyrighted. It is performed and it is all recorded.

Now, does he have to pay any copyright fee? Does any fee attach?

Mr. Ciancimino. We would contend that a fee would attach in that situation.

Senator McClellan. If it does attach; then you also contend that if a recording of that is subsequently sent to a broadcasting station and it uses it, that a further fee would attach.

Mr. Ciancimino. That would be a mechanical reproduction fee.

Senator McClellan. That would be a mechanical reproduction fee?

Mr. Ciancimino. That's right.

Senator McClellan. Now, if a cable system picks it up somewhere, would it be entitled to another copyright fee for that?

Mr. Ciancimino. Let me use the example——

Senator McClellan. I am asking. You are contending this.

Now, I want to know what this all means. Do you contend then that the cable system would also have to pay another copyright fee?

Mr. Ciancimino. That would be true, and if a broadcaster picked it up and broadcast it, they would also pay a performance fee; anyone who performs the work for profit, whether it be the original singer or whether it be the broadcaster or the cable operator.

Senator McClellan. But, first, as I understand you, Billy Graham, or whoever gave the performance when they sang this song that is copyrighted; first, he would owe a copyright fee to the author of that music.

Is that right?

Mr. Ciancimino. Yes, Mr. Chairman, in order to be clear on the matter, whether or not he himself would pay the fee, that would not necessarily be so. Many times the stadium within which——

Senator McClellan. Would it be so, or would it not?

Mr. Ciancimino. It would not be so.

Senator McClellan. Why?

Mr. Ciancimino. The stadium in which he is performing would carry with it a blanket performance license to perform any works that he would present within its confines.

Senator McClellan. Suppose they're holding it out in the cow pasture?

Mr. Ciancimino. Then he would pay a fee.

Senator McClellan. Then he would owe a fee. If they held it in a church, then he would owe a fee.

Mr. Ciancimino. If it were for profit, yes.

Senator McClellan. Unless the church secured a blanket license depending on the songs that were sung, would he owe a fee?

Mr. Ciancimino. It would be a question of whether or not it would be for profit, if it were done in a church.

Senator McClellan. So that could be three copyright fees; first, the original service; second, the broadcaster of it again, or the rebroadcast of it again by some other station; and third, by the cable system that picked it up and distributed it to a community.

Mr. Ciancimino. That is correct, and it is not at all unusual, nor is it terribly surprising. This happens quite often in today's music world.

Take for example, your football games, which have half time entertainment. The band performing that music secures a license or the stadium in which it is played has a license. If it is picked up by a network and broadcast over the facilities of the airways, then that network or the station receiving it has to have a license.

Senator McClellan. I am not arguing. I am just trying for the moment to get the facts.

Mr. Ciancimino. Yes.

Senator McClellan. Are you now undertaking to collect such fees?

Mr. Ciancimino. Yes, we are.

Senator McClellan. Have you met with any success?

Mr. Ciancimino. I am directing my remarks, Mr. Chairman, specifically to the 112(c) issue, which is the right to mechanically reproduce. And we have licensed many of the program producers of religious programs.

Senator McClellan. I am just trying to find out if the exemption provided for or proposed rather in this bill if it pretty much ratifies a practice that has been followed or if we are changing what has been the practice heretofore by this proposed legislation.

Mr. Ciancimino. I would submit, Mr. Chairman, that it would be a radical change. It would be an erosion of a right that has existed since 1909.

And secondly, it would affect an actual trade practice where we do license the program producers of religious programs that syndicate these programs, and in many instances to 200 and 300 stations. So that there would be an actual impact on the trade industry practice today, and it would deny to the creator of religious copyrights a source of income, which does exist today.

Senator McClellan. Well, I think I have seen instances—I am sure I have—where I saw Billy Graham live, his service live, and thereafter. I have seen rebroadcasts at other times. I have seen rebroadcasts of services in which, as we say, religious hymns were sung. And I am sure they were copyrighted.

Now, have you been able to collect anything on those rebroadcasts so far?

Mr. Ciancimino. From the station, Mr. Chairman?

Senator McClellan. Yes.

Mr. Ciancimino. Yes. The station is covered, again, by a blanket performance license. And there is case law that has held that a program, a sustaining program whether it be of a religious nature or of a civic nature, does contribute overall to the commercial quality of the station; and therefore, any sustaining program of that type, a religious program, would be considered——

Senator McClellan. Well, you are losing money now. And where would be the change if you are now collecting from them?

Mr. Ciancimino. I think, Mr. Chairman, there may be some confusion between the performing rights and the mechanical reproduction rights, or the right to record. The performing right area would remain unaffected. The broadcasters would still be responsible for the performance of these programs. The arenas would still be responsible for the performance of this kind of music.

The changes would be in the right to mechanically reproduce the work by program producers, somebody who puts together a program of a religious nature or of a nonreligious nature, but uses religious music in that program. As of now, they must pay a mechanical reproduction fee. 112(c) would say no, there would be an exemption, and that producers can make 4,000 copies of that program even if it be not of a religious nature, but containing religious music and can distribute 4,000 copies free without the author, composer, or publisher of that music receiving any royalties whatsoever.

And this is what we feel is unjust.

Senator **McClellan**. That is what I am trying to do. Just get the facts in the record. I wasn't trying to argue with you.

Mr. **Ciancimino**. No. I'm just trying to clarify the rights, Mr. Chairman. In one area, it would remain unaffected, in the performing rights area. But it would affect the mechanical reproduction rights area.

Senator **McClellan**. Thank you very much.

[The prepared statement of Mr. Ciancimino follows:]

PREPARED STATEMENT OF ALBERT F. CIANCIMINO, COUNSEL FOR SESAC, INC.

Mr. Chairman, members of the Committee, in the relatively short time allotted, I shall try to summarize the reasons supporting our position that Section 112(c) of S 1361 should be totally deleted.

LEGISLATIVE HISTORY

With regard to the legislative history of S 112(c), it first appears on the scene as late as February 8, 1971 with the introduction of S 644 by the Chairman of this Sub-Committee. It was not included in any prior legislation nor was it the subject of any study by the Copyright Office nor any other governmental or non-governmental body, nor to my knowledge was such a provision ever contemplated by any legislative or administrative body until shortly before February 8, 1971.

The announcement from the Copyright Office relating to the introduction of S 644 in the 92nd Congress in 1971 describes the differences between S 644 in the 92nd Congress, and S 543 in the 91st Congress as "technical amendments and a few minor additions of substantive detail." One of the "few minor additions of substantive detail" was the insertion in Section 112 of the new Sub-Section (c), which has now been carried over to the current S 1361.

Just about every significant section of S 1361 has been the subject of intense study and analysis. Not so with 112(c). Lo and behold, in 1971 without any prior notice or knowledge on the part of those representing the interests of copyright proprietors of music, it sprang into existence and became part of the copyright revision bill. Prior to today, there has never been any testimony at any prior hearings concerning the merits or pit-falls of this Sub-Section. I therefore urge this Sub-Committee to weigh carefully the following reasons why 112(c) should not be enacted into law.

NO PRIOR PRECEDENT IN MECHANICAL RIGHTS AREA

Section 112(c) would exempt from infringement the making by a non-profit organization of no more than one copy or phono-record of broadcast programs containing non-dramatic musical works of a religious nature for use in a single broadcast by a licensed broadcaster. In short, it places a limitation upon the copyright proprietor's right to mechanically reproduce the work, which to my knowledge, does not appear in prior case law or statute. There is no precedent for limiting the creator's rights in the area of mechanical reproduction of his work just because of the type of work he creates.

The current copyright law in Section 1(e) clearly grants to the copyright proprietor the exclusive right to make ". . . any form of record in which the thought of an author may be recorded and from which it may be read or reproduced." To the extent that Section 1(e) may limit this broad and exclusive grant, it does so in terms of securing the ". . . copyright controlling the parts of instruments serving to reproduce mechanically the musical work . . .", and, finally, Section 1(e) refers to extending to the copyright proprietor copyright ". . . control to such mechanical reproductions . . ." Several things are immediately clear from this language. Firstly, there was no intention on the part of Congress at the time Section 1(e) was enacted to in any way limit the copyright proprietor's right in the form of recording because of the type of work which the copyright proprietor creates, e.g., a religious work.

Secondly, there was no intention on the part of Congress to limit the author's rights to certain kinds of recording, since the statute states "any form of recording" and these are not words of limitation but rather words of all inclusiveness. It would clearly refer to not only phono-record, but also any type of magnetic tape or other reproduction of the musical composition. To the extent therefore that the National Religious Broadcasters has circulated a non-legal position which states in part that "The Copyright Law of 1909 on which SESAC's claims are based, does not refer at all to magnetic tapes since these did not come into existence until much later," we submit that such a non-legal position is both misleading and inaccurate.

RIGHT TO MECHANICALLY REPRODUCE AS DISTINGUISHED FROM OTHER RIGHTS

Proponents of 112(c) have also asserted that they are paying twice for the same copyrighted music, since the copyright proprietor receives performance fees as well as mechanical reproduction fees. It is clearly stated in Copyright Law that the right to mechanically reproduce is a distinctly separate right from the other rights granted copyright owners (M. Witmark & Sons v. Jensen, 80 F. Supp. 843 D.C. Minn. 1948). The issuance of a performance rights license does not therefore, in and of itself, grant to the licensee the right to mechanically reproduce (Foreign & Domestic Music Corp. v. Licht 196 R. 2nd 627, 2nd Cir. 1952). Conversely, a license to mechanically reproduce does not carry with it the right to perform the work (Famous Music Corp. v. Melz 28 F. Supp. 767 WD La. 1939).

Further, the mechanical reproduction license is issued to and the fee paid by the program producer. The performance of the program comes within the scope of the broadcaster's performance license agreement and is paid for by the broadcaster. It is therefore somewhat misleading for the proponents of 112(c) to allege that they are paying twice for the same music.

POTENTIAL LITIGATION

With regard to the structure of 112(c) itself, we submit that it is unclear, ambiguous, and will, if enacted, be the cause of extended litigation. Section 112(c) exempts a work of a religious nature. The term "work of a religious nature" is of extraordinary breadth. There is no definition in the statute of such a term and indeed it may very well be impossible to come up with a definition. Must a song refer to God or a supernatural being to be of a religious nature? Can a composition extolling the virtues of nature be considered a religious composition? A theme which simply fosters the concept of clean living and moral value, can this be a work of a religious nature? It would seem that whether a musical work is of a religious nature in many instances will be, not in the eyes of the beholder, but most certainly, in the ears of the listener.

Further, sub-section (c) refers to a "musical work of a religious nature *or of a sound recording . . .*". It would therefore appear to apply to any sound recording which meets the subsequent conditions of the section regardless of whether or not the musical work is of a religious nature. Again, the lack of prior study and analysis is evident. I am rather certain that this Sub-Committee does not intend to apply 112(c) to all musical compositions regardless of nature. This I have gathered from the announcement of the copyright office and introductory remarks of the Chairman when S 644 was introduced in 1971, which referred to works of a religious nature.

Finally, there is no definition of the term "transmitting organization". There are definitions of "transmission program" and "transmit" but not for a "transmitting organization".

SECOND-CLASS CITIZEN

The [illegible] are criticisms of the structure of 112(c) which I hope will become immaterial when this Sub-Committee has fully evaluated the issues involved, and has deleted 112(c) in its entirety. There is absolutely no justification for this 112(c) exemption from copyright infringement which in effect treats the creator of religious works as a second-class citizen. One who creates a religious copyright and desires to live from the profits gained therefrom has the same expenses as one who creates a non-religious copyright. He must pay the same amount for a loaf of bread or a bottle of milk. Why then the distinction in allowing the author of a non-religious work a broader earning base then the creator of a religious copyright? Why allow a program producer to distribute 4,000 copies of taped programs to broadcasters throughout the country without payment being made to those creators whose religious music is being used?

With Public Law No. 93-140, this Congress in 1971 has expanded the area of copyright protection as it relates to the right to reproduce sound recordings when it passed what is commonly referred to as the Anti-Piracy legislation. The protection accrues to the benefit of the company that owns the physical sound recording itself and guards against its unauthorized duplication. It covers *all* sound recordings and not just sound recordings of works of a non-religious nature. It does seem somewhat incongruous and unjust to extend such a right to a person other than the author in sound recordings of a religious nature while at the same time enacting 112(c) which would limit the author's right to mechanically reproduce the work if it be of a religious nature. We agree with the anti-piracy legislation. In fact, as Chairman of Committee 301 of the American Bar Association, I had the pleasure of sponsoring a resolution which was ultimately passed by the ABA in favor of such an extension of copyright. I can only hope that this Sub-Committee will recognize the contradiction and inconsistency of 112(c) which would limit, dilute and erode the copyright proprietor's rights. Again, why, should the author of a religious work be treated as a second-class citizen?

ENDORSEMENTS

As a member of Committee 304 of the ABA, I would like to advise the Sub-Committee that Committee 304 has passed the following resolution which it will submit to the ABA at its annual meeting in Washington next week:

"*Resolve*, That the section of Patent, Trademark and Copyright Law opposes in principle any statutory limitation which would exempt from infringement the making by a non-profit organization of recordings of broadcast programs containing non-dramatic musical works of a religious nature for use in a single broadcast by a licensed broadcaster.

"Specifically, the Section of Patent, Trademark and Copyright Law opposes in its entirety Section 112(c) of S 1361, McClellan, 93rd Congress, First Session."

As part of the discussion on this resolution, the Committee felt that in order to continue to foster and nourish writers of gospel, religious and sacred works, Congress should not create a barrier to such creators' earnings in the area of mechanical reproduction rights. I am pleased to report that on Tuesday, July 17, 1973 in Chicago, the above resolution was approved by the Counsel of the Patent, Trademark and Copyright Law Section subject to ratification by the Section at the annual meeting. Once approved by Counsel it is fair to say that it is virtually assured of passage as an ABA resolution next week.

Mr. Chairman, I would like to submit as part of my written statement letters from 23 outstanding publishers of gospel and sacred music asking this Sub-Committee to delete Section 112(c). I would also like to take a few moments at this time to read the following brief letters endorsing our position.

In conclusion, I ask this Sub-Committee to consider and weigh the practical necessities for such an exemption against the far-ranging and negative effects which it will have, not only on trade industry practice as it currently exists, but on the unwarranted dilution of the rights originally granted to the copyright proprietor by Congress in 1909. Only by allowing the copyright proprietor of religious works equal rights and an equal opportunity to earn a living, will we continue to enjoy the kind of music which has contributed to and hopefully will continue to contribute to the moral fiber of our great country.

Thank you.

SESAC, INC.

NEW YORK, N.Y., *August 13, 1973.*

THOMAS C. BRENNAN,
Chief Counsel,
Old Senate Office Building,
Washington, D.C.

DEAR TOM: You may recall that Senator McClellan asked me to submit the letters of support which I read from as part of my presentation on August 1st. May I enclosed copies of said letters for inclusion in the Record. If you need additional copies, please let me know.

Sincerely,

ALBERT F. CIANCIMINO, *Counsel.*

HARRY FOX AGENCY, INC.,
New York, N.Y., July 29, 1973.

ALBERT F. CIANCIMINO, Esq.,
Sesac, Inc., New York, N.Y.

DEAR MR. CIANCIMINO: We agree with the position taken by Sesac that inclusion of Section 112(c) in S. 1361 would be detrimental and contrary to the legitimate interests of publishers and authors.

Sincerely,

ALBERT BERMAN.

NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.,
New York, N.Y., July 29, 1973.

ALBERT F. CIANCIMINO, Esq.,
Sesac, Inc., New York, N.Y.

DEAR MR. CIANCIMINO: The National Music Publishers' Association agrees with the position taken by Sesac concerning Section 112(c) of S. 1361.

We have read your statement to be presented before the Senate Sub-Committee on Patents, Trademarks and Copyrights on August 1, 1973. Undoubtedly because of the necessary brevity of the statement, other significant and relevant material has not been included. Therefore, we shall ask permission of the Sub-Committee to submit a statement dealing with certain additional important points and problems involved.

Sincerely,

LEONARD FEIST.

MUSIC PUBLISHERS ASSOCIATION OF THE UNITED STATES,
New York, N.Y., April 17, 1973.

Mr. ALBERT CIANCIMINO,
Sesac, Inc.,
New York, N.Y.

DEAR AL: At a Board Meeting of this association on April 11, the following resolution was passed unanimously:

"*Resolved*, That MPA supports SESAC in its efforts to eliminate the proposed exemption for the making of copies of tapes of religious broadcasts."

Would you kindly keep me up-to-date as to your efforts and also send me copies of any statements or documentation relating to your efforts which may be available.

For your information enclosed is a statement I submitted respecting Section 108(d).

Kindest regards.

Sincerely,

PHILIP B. WATTENBERG.

CHURCH MUSIC PUBLISHERS ASSOCIATION,
July 24, 1973.

Mr. ALBERT F. CIANCIMINO,
Sesac,
New York, N.Y.

DEAR MR. CIANCIMINO: This letter is to certify that the Church Music Publishers Association heartily endorses the position of Mr. Albert F. Ciancimino on the total deletion of Section 112C of the Bill S1361.

Cordially yours,

STEVEN R. LORENZ, *President.*

BROADCAST MUSIC INC.,
New York, N.Y., July 25, 1973.

ALBERT F. CIANCIMINO, Esq.,
Sesac Inc.,
New York, N.Y.

DEAR AL: Although the supporters of proposed section 112(c) are undoubtedly well-intentioned, it is readily apparent that they have not studied the existing Copyright Law, its history, or the proposed revision in its entirety. Clearly, there is no justification for the imposition of those limitations contained in Section 112(c).

Sincerely,

EDWARD M. CRAMER.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS,
New York, N.Y., July 25, 1973.

ALBERT F. CIANCIMINO, Esq.,
Sesac, Inc.,
New York, N.Y.

DEAR MR. CIANCIMINO: I have been authorized by the American Society of Composers, Authors and Publishers on behalf of its members to advise you that they join the writers and publishers of religious works whom you represent in opposing enactment of § 112(c) of S. 1361.

That provision, if enacted, would create a new exemption previously unknown to the copyright law. It would exempt the unauthorized manufacture and distribution of recordings of performances of works of a religious nature for use by organizations having a license to perform the work. Organizations such as ASCAP make their entire repertory available at very little cost to organizations that have very little commercial income. If these performance licenses must carry with them an involuntary recording license with respect to works of a religious nature, it would be necessary to increase the performance license fees to make up for an invasion of the recording right. Thus, one who is not interested in obtaining recording rights would have to pay for a privilege desired by someone else. This is contrary to the entire spirit of the copyright law which expressly provides for a separation of rights. It would be contrary to the public interest because the public would suffer by discouraging writers and publishers of religious works from making those works generally available at modest rates. There is no reason for exempting recording manufacturers merely because they do not seek a profit. They pay for electricity, telephones and other services; they certainly should pay the composers of religious works.

In sum, it is submitted that enactment of § 112(c) would be contrary to the public interest as set forth in the Constitution, which empowers Congress to promote that interest by securing to authors the exclusive right to their writings (U.S. Cons., Art. I, § 8). To the extent that compulsory recording licenses are believed appropriate, there is ample safeguard in Section 115 of S. 1361. That provides for a nominal payment with respect to works of which phonorecords have been distributed to the public under the authority of the copyright owner. No further invasion of the authors' exclusive rights should be permitted.

Sincerely,

HERMAN FINKELSTEIN,
General Counsel.

BARKSDALE, WHALLEY, LEAVER, GILBERT & FRANK,
Nashville, Tenn., July 23, 1973.

Re Senate hearings of August 1, 1973—National religious broadcasters copyright exemption.

Mr. AL CIANCIMINO,
Sesac, Inc., New York, N.Y.

DEAR AL: As attorney for the International Gospel Music Publishers Association. I wish to go on record on behalf of the Association as being emphatically opposed to any copyright revision granting religious broadcasters any exemption from the paying of performance or mechanical rights pursuant to the Copyright Act of the Untied States. Specifically, we are opposed to the proposed copyright amendments contained in Senate Bill 644, §§ 112-B and 112-C.

Please find enclosed a resolution adopted by the International Gospel Music Publishers Association in January of 1973. Also please find enclosed a listing of the membership and sympathizers of the Association, representing substantially every aspect of gospel and sacred music industry throughout the United States.

The approach of the National Religious Broadcasters is an unwarranted attack upon the copyright citadel of the United States, wholly unjustifiable, without merit, and an erosion of the property rights of copyright holders.

Very truly yours,

R. DAVID LUDWICK.

RESOLUTION OF INTERNATIONAL GOSPEL MUSIC PUBLISHERS' ASSOCIATION OPPOSING PROPOSED § 112B AND § 112C, AMENDMENTS TO COPYRIGHT ACT

Whereas an amendment to the Copyright Act has been proposed in Senate Bill S644, §§ 112B and 112C, which seeks to grant to the "Government" and non-profit organizations an exemption from payment of fees for mechanical reproduction of "sacred" musical works; and

Whereas International Gospel Music Publishers' Association consists of publishers of musical works of gospel and sacred nature devoted to the dissemination of religious messages; and such publishers have a duty to protect the copyrights on such musical works for the benefit of the composers against infringement of copyrights and to collect from all users of such works the fees required by the Federal Copyright Act for mechanical reproduction of such copyrighted works and to pay the composers their prorata shares of such fees; and

Whereas such musical works constitute literary property protected under the Copyright Act by a requirement for payment of fees as compensation for compulsory licensing of usage of such musical works for mechanical reproduction thereof; and such statutory protection constitutes a valuable property right of the composers and publishers of such copyrighted works; and

Whereas the proposed statutory exemption from payment of fees for mechanical reproduction of such works by the "government" and non-profit organizations would constitute an unconstitutional taking of valuable property rights without condemnation proceedings and without due process of law; and

Whereas no reasonable basis exists for a special classification of "sacred" musical works distinct from any other musical works; and

Whereas the proposed amendment exempting "sacred" musical works contains no standard from which a determination may be made as to which musical works are classified as "sacred" musical works; hence such statutory exemption of "sacred" musical works is too indefinite and uncertain to constitute a valid legislative enactment; and

Whereas the proposed amendment exempting "sacred" musical works contains no definition of the nature or limitation of usage to be made by the "government" or non-profit organizations in such mechanical reproductions of such musical works and hence such statutory exemption is too indefinite and uncertain to constitute a valid legislative enactment capable of any practical application to any particular works or any certain usage by such mechanical reproductions: Now, therefore, it is hereby

Resolved, That the Internation Gospel Music Publishers' Association is opposed to the adoption of such amendment to the revision of the Copyright Act, and is specifically opposed to the adoption of § 112B and 112C as contained in Senate Bill S644 for the proposed revision of Copyright Act, be it further

Resolved, That a copy of this resolution unanimously adopted at the meeting of International Gospel Music Publishers' Association in Washington, D.C. on January 30, 1973, be recorded as part of the minutes of said meeting; and

Resolved further, That copies of this resolution be mailed to the members of the Subcommittee on Patents, Trademarks and Copyrights of the Judiciary Committee of the United States Senate, and to Thomas C. Brannan, Chief Counsel, United States Senate, Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights, Washington, D.C. 20510, and to Miss Barbara Ringer, Assistant Register of Copyrights, Copyright Office, The Library of Congress, Washington, D.C. 20540.

Beasley and Barker, Les Beasley, Pensacola, Florida.
John T. Benson Publishing Co., John T. Benson III, Nashville, Tennessee.
Blackwood-Marshall Music, Inc., The Blackwood, Nashville, Tennessee.
Cedarwood Music Publishing Co., Bill Denney, Nashville, Tennessee.
Eternal Music Co., George Younce, Stow, Ohio.
Faith Music Co., Don Butler, Atlanta, Georgia.
Gaither Music Co., Bill Gaither, Alexandria, Indiana.

Gospel Quartet Music Co., J. D. Sumner, Nashville, Tennessee.
Hamblen Music Co., Stuart Hamblen, Universal City, California.
Harvestime, Henry Slaughter, Nashville, Tennessee.
Journey Music Co., Roy Conley, Madisonville, Kentucky.
LeFevre-Sing, Jimmy Jones.
Albert Brumley Co., Albert Brumley, Powell, Missouri.
Lillenas Publishing Co., Albert Brumley, Powell, Missouri.
Manna Music Co., Hal Spencer, North Hollywood, California.
Mark IV Music, Inc., Fred Daniel, Spartanburg, South Carolina.
Nashville Gospel, Lou Hildreth, Nashville, Tennessee.
Rambo Music Co., Buck Rambo, Nashville, Tennessee.
Silverline Music Co., Duane Allen, Nashville, Tennessee.
Singspiration, P. J. Zondervan, Grand Rapids, Michigan.
Ben Speer Music Co., Ben Speer, Nashville, Tennessee.
Tennessee Music and Printing Co., Connor B. Hall, Cleveland, Tennessee.
Thrasher Bros., Jim Thrasher, Birmingham, Alabama.
Word, Inc., Billy Ray Hearn.

Senator McClellan. Call the next witness.

Mr. Brennan. The National Religious Broadcasters.

Dr. Nelson. Yes, my name is Wilbur E. Nelson. I live in Long Beach, Calif., and I am accompanied by Mr. John Midlen, counsel for National Religious Broadcasters, and Dr. Ben Armstrong, executive secretary of National Religious Broadcasters.

Senator McClellan. All right, Dr. Nelson, you may proceed.

STATEMENT OF REV. DR. WILBUR E. NELSON, SECRETARY, NATIONAL RELIGIOUS BROADCASTERS; ACCOMPANIED BY: JOHN H. MIDLEN, COUNSEL; AND DR. BEN ARMSTRONG, EXECUTIVE SECRETARY, NATIONAL RELIGIOUS BROADCASTERS

Dr. Nelson. I am an ordained minister of the Evangelical Free Church. I am the minister and director of the Morning Chapel Hour. And incidentally, I am a composer of religious music under contract of Zondervan, an inspirational music publishing company.

I present this testimony as secretary of National Religious Broadcasters and as chairman of its copyright committee concerning section 112(c) of S. 1361.

National Religious Broadcasters—NRB—is a nonprofit association formed in 1944 in order to contribute to the improvement of religious broadcasts, better to serve the public interest, and more effectively to minister to the spiritual welfare of this Nation. The association has approximately 550 members organizations distributed among the 50 States of the United States, the District of Columbia and Puerto Rico.

The membership of National Religious Broadcasters consists of: first, broadcast station licensees and their associates; second, performing artists and others related to broadcasting; and third, those producing religious programs for broadcast stations. There are more than 425 organizations, including those who are not NRB members, which produce religious programs on a nonprofit basis for presentation on a number of broadcast stations.

Additionally, it is conservatively estimated there are more than 1,500 pastors and rabbis having individual programs on local broadcast outlets.

Among the more widely known religious programs produced by NRB members for broadcasting are Billy Graham's Hour of Decision, The Lutheran Hour, The Baptist Hour, Methodist Hour, Back to the

Bible, Light and Life Hour (Free Methodist), Revivaltime (Assemblies of God), Morning Chapel Hour, Herald of Truth (of the Church of Christ), and many, many others.

Other religious programs utilizing religious music and having extensive broadcast dissemination include the Hour of St. Francis, Ave Maria Hour, Sacred Heart Hour, The Protestant Hour, Voice of Prophecy of the Seventh-Day Adventist, Lamp Unto My Feet (ecumenical), Jewish Dimension, The Eternal Light, and Jewish Community Hour.

These and practically all religious program producers are vitally concerned that there be enacted to the present provisions of section 112(c) of the pending S. 1361 for general revision of the copyright law clarifying the right of nonprofit organizations under certain circumstances to make for distribution to licensed transmitting organizations phonorecordings of religious music for usage in religious programs.

The religious music used in religious programs creates an appropriate devotional mood as well as serves as a musical bridge between the spoken words with the degree of usage of religious music varying from program to program. The format for the various religious programs differs, of course, in degree, but the production and distribution principles are relatively uniform.

The programs are produced either on tape or disc for distribution by mail of one copy only to each broadcast station carrying the program. The programs then are broadcast at the time and day agreed upon between the station and the program producer. None of these programs is produced for profit by the religious producers.

In fact, the religious program producer usually pays the broadcast station to carry the program or furnishes the religious program without charge to the broadcast outlet. The broadcast stations customarily have performance rights licenses covering this religious music with ASCAP, BMI, and SESAC.

NRB supports the rights of the copyright owners to compensation for performances of religious music under these performance rights licenses with the broadcast outlets. NRB also supports the rights of the copyright owners to compensation for mechanical reproductions of religious music made for sale or other profit.

There presently exists confusion and contradiction with respect to claims for mechanical reproduction fees for musical works of a religious nature included in religious programs produced by nonprofit organizations for broadcasting purposes. Religious program producers have reported no problems in this respect with ASCAP or BMI.

Only SESAC, according to frequent reports, has pressured certain of the religious program producers to make such payments. Further, there is a basic division in the ranks among Gospel or religious music publishers with some seeking to assert mechanical reproduction claims and others considering that they are not appropriate.

Any law requiring or leaving open the possibility that mechanical reproduction fees be paid for such use could make this music too expensive in the average religious broadcast since the financial resources of these program producers are not adequate to accommodate such cost as documented by an NRB study. In this study, National

Religious Broadcasters conducted a questionnaire survey among its membership in the spring of 1973.

The effect of the potential of unlimited mechanical reproduction fees among these responding organizations preponderantly ranged from: First, using only religious music in the public domain with such disadvantage for the listening or viewing audience to: secondly, substantial curtailment of the number of broadcast outlets used; or thirdly, even total discontinuance of the religious program.

Such a result would be a loss to all concerned, the composer, publisher, broadcaster, and most important the listening American public—since it could place a substantial part of modern religious music financially out of reach so far as religious broadcasting through use of mechanical reproduction means is concerned.

Responsible religious broadcasting is a nonprofit activity, carried on as a ministry no less viable than the worship services of a church or a synagogue. Essentially the taping or recording of programs not for profit and for a single release is simply a means of producing such programs for convenience.

It obviates the necessity of releasing the program live utilizing the more expensive and totally impractical method of telephone lines from the program producer to the individual broadcast stations, a procedure which would be undeniably exempt from any claim for mechanical reproduction fees.

The proposed mechanical reproduction exemption would cause no measurable injury to religious music copyright owners, their publishers or agents. The creators of religious music derive their income primarily from publishing and selling hymnals, Gospel songbooks, and sheet music. This is supplemented by income from performing and synchronization rights licenses.

Moreover, only a small percentage of the repertoire of religious music is ever broadcast. There is a tendency to emphasize the music that is or has been popular so that a majority of the songs in hymnals, Gospel songbooks, and sheet music are never presented in religious programs on radio or television stations.

Nor can these religious music copyright owners really complain that the proposed section 112(c) in the copyright bill deprives them of existing income. To the best of our knowledge, only a small handful of religious program producers succumbed to SESAC's pressures for payment for mechanical reproductions in nonprofit religious programs for broadcasting, and some of those have since terminated such payments.

In short, the religious music copyright owners and their associates, who have been financially successful without mechanical reproduction income from nonprofit religious programs, can make no claim for loss of income that they have never really had.

In addition, mechanical reproduction fees for religious music in programs produced by nonprofit organizations for broadcast stations could present substantial practical problems. Much of the music is not listed in catalogs of copyright owners so that there would be added the burden of seeking to ascertain to whom any such payments would be made.

Copyright legislation has rightly sought to protect copyright holders from mechanical reproduction of their literary property by those who do so for profit, whether large or small. Religious program producers, however, clearly are not doing so for profit, but for the purpose of using religious music for religious inspiration.

That the use made of religious music in a conventional religious broadcast is not for profit is demonstrated by the fact when the recorded program has been broadcast, the tape is returned to the program producer or the disc destroyed. Its contents then are erased so that the tape may be utilized for subsequent broadcasts.

Copyright owners can make no claim that the recordings are offered for sale since the tapes for religious broadcasts are not sold. In fact, the reverse takes place with the program producer paying the broadcast station to carry the program, or furnishing it without charge.

The present copyright exemption language of paragraph 112(c) is carefully designed to cover only mechanical reproductions with limitations for nonprofit religious programing. The program producer must be: first, a nonprofit organization, or governmental body; second, only one copy of the program can be distributed to the broadcast or transmitting outlet; third, the musical work is of a religious nature; fourth, the program producer receives no direct or indirect compensation for making or distributing such tape or recording; fifth, there is only a single transmission to the public by the broadcast station or other transmitting organization having a license therefor; and sixth, except for one copy reserved for archival purposes, the tapes or records are destroyed within a year from the date of the public transmission.

The responsible religious programers meet these criteria, and their position clearly justifies the proposed exemption.

Mr. Chairman, the position here stated is supported by a resolution adopted by the National Association of Evangelicals, representing 36,000 churches at its convention in May 1973.

In conclusion, the proposed provisions of section 112(c) will be equally beneficial to Protestant, Catholic, and Jewish nonprofit religious program producers. There is a need to improve the moral tone and well-being of our Nation. Increased religious broadcasting for this purpose is a definite need.

And we urge the enactment in its present form of section 112(c) of S. 1361.

Thank you.

Senator McCLELLAN. May I ask if demands have been made upon you in the past for copyright fees?

Dr. NELSON. Yes, they have.

Senator McCLELLAN. When were these demands first initiated?

Dr. NELSON. Well, in my own case, about a year ago.

Senator McCLELLAN. Does section 112(c) in any way change the practice and the custom that has prevailed in the past?

Dr. NELSON. I think its adoption would continue the situation as it is.

Senator McCLELLAN. That's what I'm asking.

Does it legalize, finalize as the law, the custom that has prevailed in the past with respect of rebroadcasting religious services?

Dr. NELSON. Yes, sir. I think it ratifies the principle that religious music should be used for religious purposes without strictures of this kind.

Senator McCLELLAN. Now, do I also understand that you want this restricted under section 112(c) to nonprofit?

Dr. NELSON. Well, that is a basic point, Mr. Chairman. That is the basic point. We do not feel that we have any right to contest the rights of copyright owners in cases where performances have any measure of profit, large or small.

Senator McCLELLAN. So this would only apply to those nonprofit services?

Dr. NELSON. Yes, sir.

Senator McCLELLAN. Rebroadcast?

Well, thank you very much.

Mr. MIDLEN. Thank you, Mr. Chairman, and may the written statement for National Religious Broadcasters be incorporated into the record?

Senator McCLELLAN. Very well. It will be received and placed in the record.

[The prepared statement of Rev. Dr. Wilbur E. Nelson follows:]

TESTIMONY OF REV. DR. WILBUR E. NELSON FOR NATIONAL RELIGIOUS BROADCASTERS

INTRODUCTION

My name is Wilbur E. Nelson and I live in Long Beach, California. I am an ordained Minister of the Evangelical Free Church and Minister and Director of Morning Chapel Hour. I present this testimony as Secretary of National Religious Boadcasters and Chairman of its Copyright Committee concerning Section 112(c) of S. 1361.

National Religious Broadcasters (NRB) is a non-profit association formed in 1944 in order to contribute to the improvement of religious broadcasts, better serve the public interest, and more effectively minister to the spiritual welfare of this nation. The association has approximately 550 member organizations distributed among the 50 states of the United States, the District of Columbia and Puerto Rico. The membership of National Religious Broadcasters consists of (1) broadcast station licensees and their associates, (2) performing artists and others related to broadcasting, and (3) those producing religious programs for broadcast stations. There are more than 425 organizations, including those who are not NRB members, that produce religious programs on a *non-profit* basis for presentation on a number of broadcast stations. Additionally, it is conservatively estimated there are more than 1,500 pastors and rabbis having individual programs on local broadcast outlets.

Among the more widely known religious programs produced by NRB members for broadcasting are Billy Graham's Hour of Decision, The Lutheran Hour, The Baptist Hour, Methodist Hour, Back to the Bible (daily), Light and Life Hour (Free Methodist), Revivaltime (Assemblies of God), Morning Chapel Hour (daily), Herald of Truth, and many, many others. Other religious programs utilizing religious music and having extensive broadcast dissemination include the Hour of St. Francis, Ave Maria Hour, Sacred Heart Hour, The Protestant Hour, Voice of Prophecy (Seventh Day Adventist), Lamp Unto My Feet (ecumenical), Jewish Dimension, The Eternal Light, and Jewish Community Hour.

These and practically all religious program producers are vitally concerned that there be enacted the present provisions of Section 112(c) of the pending S. 1361 for general revision of the Copyright Law clarifying the right of nonprofit organizations under certain circumstances to make for distribution to licensed transmitting organizations phonorecordings of religious music for usage in religious programs.

GENERAL DESCRIPTION OF RELIGIOUS PROGRAMS

The religious music used in religious programs creates an appropriate devotional mood as well as serves as a musical bridge between the spoken words with the degree of usage of religious music varying from program to program. The format for the various religious programs differs, of course, in degree, but the production and distribution principles are relatively uniform. The programs are produced either on tape or disc for distribution by mail of one copy only to each broadcast station carrying the program. The programs then are broadcast at the time and day agreed upon between the station and the program produced. *None* of these programs is produced *for profit* by the religious program producers. In fact, the religious program producer usually pays the broadcast station to carry the program or furnishes the religious program without charge to the broadcast outlet. The broadcast stations customarily have performance rights licenses covering this religious music with ASCAP, BMI, and SESAC. NRB supports the rights of the copyright owners to compensation for performances of religious music under these performance rights licenses with the broadcast outlets. NRB also supports the rights of the copyright owners to compensation for mechanical reproductions of religious music made for *sale* or other *profit.*

THE NEED FOR THE MECHANICAL REPRODUCTION EXEMPTION FOR RELIGIOUS PROGRAMS

There presently exists confusion and contradiction with respect to claims for mechanical reproduction fees for musical works of a religious nature included in religious programs produced by non-profit organizations for broadcasting purposes. Religious program producers have reported no problems in this respect with ASCAP or BMI. Only SESAC, according to frequent reports, has pressured certain of the religious program producers to make such payments. Further, there is basic division in the ranks among Gospel or religious music publishers with some seeking to assert mechanical reproduction claims and others considering that they are not appropriate. (See attached letters of March 21, 1973 from Affiliated Music Enterprises and Interpublications, Inc.). We know of no court decision directly on the point.

Primarily sacred music is written and published for the purpose of spiritual ministry and religious inspiration. It is incorporated into religious broadcasts wholly apart from any intention or possibility of financial gain.

Any law requiring or leaving open the possibility that mechanical reproduction fees be paid for such use could make this music too expensive in the average religious broadcast since the financial resources of these program producers are not adequate to accommodate such cost as documented by an NRB study. In this study, National Religious Broadcasters conducted a Questionnaire Survey among its membership in the Spring of 1973. The effect of the potential of unlimited mechanical reproduction fees among these responding organizations preponderantly ranged from (1) using only religious music in the public domain with such disadvantage for the listening or viewing audience to (2) substantial curtailment of the number of broadcast outlets used or (3) even total discontinuance of the religious program. Such a result would be a loss to all concerned, the composer, publisher, broadcaster, and most importantly the listening American public—since it could place a substantial part of modern religious music financially out of reach so far as religious broadcasting through use of mechanical reproduction means is concerned.

JUSTIFICATION FOR THE PROPOSED EXEMPTION

Responsible religious broadcasting is a *non-profit* activity, carried on as a ministry no less viable than the worship services of a church or a synagogue. Essentially the taping or recording of programs *not for profit* and for a *single release* is simply a means of producing such programs for convenience. It obviates the necessity of releasing the program "live" utilizing the more expensive and totally impractical method of telephone lines from the program producer to the individual broadcast stations, a procedure which would be undeniably exempt from any claim for mechanical reproduction fees.

It is common knowledge that religious program producers render a valuable service to copyright owners by the very use of their music for such music is given exceedingly broad exposure through radio and television presentations. Many, if not most, programs featuring religious music have accompanying ready-made information sheets for the purpose of acquainting listeners requesting details concerning such music including the author, composer, publisher, and possible location where the music as records or sheet music may be purchased. These informational sheets are of great assistance because of the high incidence of requests for the data to the clear advantage of the copyright owner.

The proposed mechanical reproduction exemption would cause no measurable injury to religious music copyright owners, their publishers or agents. The creators of religious music derive their income primarily from publishing and selling hymnals, gospel songbooks, and sheet music. This is supplemented by income from performing and synchronization rights licenses.

Moreover, only a small percentage of the repertoire of religious music is ever broadcast. There is a tendency to emphasize the music that is or has been popular so that a majority of the songs in hymnals, gospel songbooks, and sheet music are never presented in religious programs on radio or television stations.

Nor can these religious music copyright owners really complain that the proposed Section 112(c) in the Copyright Bill deprives them of existing income. To the best of our knowledge only a small handful of religious program producers succumbed to SESAC's pressures for payment for mechnical reproductions in non-profit religious programs for broadcasting, and some of those have since terminated such payments. In short, the religious music copyright owners and their associates, who have been financially successful without mechanical reproduction income from nonprofit religious programs, can make no claim for loss of income that they never really had.

In addition, mechanical reproduction fees for religious music in programs produced by non-profit organizations for broadcast stations could present substantial practical problems. Much of the music is not listed in catalogues of copyright owners so that there would be added the burden of seeking to ascertain to whom any such payments would be made.

Copyright legislation has rightly sought to protect copyright holders from mechanical reproduction of their literary property by those who do so for *profit*—whether large or small. Religious program producers, however, clearly are not doing so for profit, but for the purpose of using *religious* music for religious inspiration.

That the use made of religious music in a conventional religious broadcast is *not for profit* is demonstrated by the fact that when the recorded program has been broadcast, the tape is returned (or the disc destroyed) to the program producer. Its contents then are erased so that the tape may be utilized for subsequent broadcasts. Copyright owners can make no claim that the recordings are offered for sale since the tapes for religious broadcasts are not sold. In fact, the reverse takes place with the program producer paying the broadcast station to carry the program, or furnishing it without charge.

The present copyright exemption language of Paragraph 112(c) is carefully designed to cover only mechanical reproductions with limitations for non-profit religious programming. The program producer must be (1) a nonprofit organization (or governmental body), (2) only one copy of the program can be distributed to the broadcast or transmitting outlet, (3) the musical work is of a religious nature, (4) the program producer receives no direct or indirect compensation for making or distributing such tape or recording, (5) there is only a single transmission to the public by the broadcast station or other transmitting organization have a license therefor, and (6) except for one copy reserved for archival purposes the tapes or records are destroyed within a year from the date of the public transmission. The responsible religious programmers meet these criteria, and their position clearly justifies the proposed exemption.

SUPPORTING RESOLUTION OF NATIONAL ASSOCIATION OF EVANGELICALS

A major church body, the National Association of Evangelicals—which numbers among its membership more than 36,000 churches of various denominations in the United States—on May 2, 1973 at its Thirty-First Annual Convention adopted a Resolution supporting the provisions in Section 112(c) of S. 1361 relating to religious broadcasting by non-profit organizations and urging that S. 1361 be so enacted. This Resolution of the National Association of Evangelicals is attached to this Statement.

CONCLUSION

The proposed provisions of Section 112(c) will be equally beneficial to Protestant, Catholic and Jewish non-profit religious program producers. Recent public developments have demonstrated that more than ever before there is a need to improve the moral tone and well-being of our nation. Increased religious broadcasting for this purpose is a definite need, and we urge the enactment in its present form of Section 112(c) of S. 1361 so that there will be encouraged rather than decreased or eliminated the amount of religious programming for this purpose.

AFFILIATED MUSIC ENTERPRISES,
Melbourne, Fla., March 21, 1973.

Dr. BEN ARMSTRONG,
Executive Director, National Religious Broadcasters,
Madison, N.J.

DEAR DR. ARMSTRONG: We are pleased to advise you that we do not intend to charge mechanical royalties in connection with tapes which are syndicated by religious program producers.

Performance rights are licensed to the stations directly by BMI. No further fees are required.

A schedule of our affiliated publishers is attached.

Sincerely,

K. A. JADASSOHN.

LIST OF PUBLISHERS

Beazley, Samuel W., & Son
Geraico Productions
Good News Broadcasting Association, Inc.
Gospel Advocate Company, Inc.
Greene, S. N.
Grundy, S. K.
Guffey, Tharon and Murl
Happy Hearts Music
Keene, Hank, Inc.
Kreiser, Harper
Landmark Music Co.
Sacred Music Foundation
Sanderson, L. O.
Sisk Music Company
Stamps-Baxter Music & Printing Company
Tovey, Herbert G.
Worship Music, Inc.
Wright, La Verne
Zondervan Music Publishers

INTERPUBLICATIONS, INC.,
Melbourne, Fla., March 21, 1973.

Dr. BEN ARMTSRONG,
Executive Director, National Religious Broadcasters,
Madison, N.J.

DEAR DR. ARMSTRONG: Re "Mechanical" (Recording) Royalties: In accordance with our present policy, there will be no charge for mechanical royalties of any songs from our repertory included in the tapes of syndicated religious programs.

Re "Performance" (Broadcasting) Royalties: Our performance rights are cleared through BMI under whose licenses the radio stations may broadcast the music of our associated companies without extra charge (a list of our publishers is enclosed).

Sincerely,

K. A. JADASSOHN.

LIST OF PUBLISHERS

Airlane Music Co.
Wally Ambrose Music
Armstrong-Smith Publications
Ascending Sounds
Richard D. Baker Company
B. Elizabeth Baraw
Brooks Christian Singers, Inc.
Chaplet Music Company
Child Evangelism Fellowship, Inc.
Creative Sacred Music
Crescendo Music Publications, Inc.
Day & Day Music Co.
Dawn-Ray Music Company
Edify Publications
The Eleventh Hour
Neil Enloe Music Co.
Esprit Music Company
Fellowship Music
Tex Fletcher Music Corp.
Global Missions, Inc.
Hosanna House
Howard Pub. of Louisiana
Huffman Publishing Co.
Interservice Music
Impact Music Company
Janz Team
Jaycarol Music
Kilpatrick-Jansen Music Co.
LaKaan Productions
Lari-Jo Music
Luada Publishing Co.
Macaulay Productions
Marc-Lane Productions of Tennessee
Horace L. Mauldin
National Music Co.
New Horizons
Nat Olson Publications
Philadelphia Book Concern
Pleasant Ridge Music
Postlude Music Publications
Radiant Songs
Eddie Reece Productions
Richler Music Publications
Alfred B. Smith
Ethel M. Smith
Sound Associates
Sunrise Productions
Vanzant & Vanzant
The Voice of Salvation Music
Word of Healing Music

COPYRIGHT LAW AND RELIGIOUS BROADCASTING

Whereas there was introduced on March 26, 1973 and is pending before the Senate of the United States a Bill (S. 1361) for the general revision of the Copyright Law, and

Whereas there is included in the Copyright Bill a provision (Section 112c) clarifying the right of non-profit organizations under certain circumstances to make for distribution to licensed transmitting organizations phonorecordings of religious music, and

Whereas payment of copyright fees for mechanical recordings of religious music for transmission over broadcast outlets could impose financial demands that would seriously curtail or possibly eliminate in some instances the presentation of religious programming, and

Whereas the National Association of Evangelicals, which numbers among its membership more than 36,000 churches of various denominations in the United States, considers that the state of the nation and of the world requires increased rather than decreased religious broadcasting to improve the morale tone and well-being of the nation; Now, therefore

The National Association of Evangelicals, at this 31st Annual Convention at Portland, Oregon on May 2, 1973, does hereby support the provision in Section 112c of S. 1361 relating to religious broadcasting by non-profit organizations and does hereby urge that S. 1361 be so enacted.

Passed by the Annual Business Sessions on May 2, 1973.

Mr. BRENNAN. Mr. Chairman, the final issue to be considered in these hearings is the carriage of sporting events by cable television.

We shall hear first from the National Cable Television Association.

Mr. Hostetter, would you identify yourself and your colleagues for the record, plase?

Mr. HOSTETTER. Mr. Chairman, I am Amos B. Hostetter, Jr., chairman of the National Cable Television Association with offices here in Washington, D.C.

At the table with me, this afternoon, on your extreme right is Rex Bradley, president of Telecable Corp., of Norfolk, Va.; Stewart Feldstein, general counsel of the National Cable Televsion Association; and on my right, Gary Christensen, special counsel to NCTA.

Senator MCCLELLAN. Very well.

I believe you gentlemen have 40 minutes to present your views, and your full prepared statement will be inserted in the record.

STATEMENT OF AMOS B. HOSTETTER, JR., CHAIRMAN, NATIONAL TELEVISION ASSOCIATION, INC.; ACCOMPANIED BY: REX BRADLEY, PRESIDENT OF TELECABLE CORP. OF NORFOLK, VA.; STEWART FELDSTEIN, GENERAL COUNSEL; AND GARY CHRISTENSEN, SPECIAL COUNSEL, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. HOSTETTER. I understand that we do have an allotted 40 minutes time period, which Mr. Bradley and I will primarily split in discussing sports provisions of the proposed bill. However, I would like to take a few minutes before we begin with that presentation to deal with what appeared to me to be two questions raised in this morning's testimony, which I felt were not answered adequately or completely.

The first of those two questions was the mention of the so-called OTP compromise and why NCTA agreed to accept the position embodied therein. A short answer to that question is that NCTA was placed under intense pressure, and really was given two fundamental choices; neither of which were desirable from the industry's point of view.

Senator McCLELLAN. You're talking about the consensus agreement?

Mr. HOSTETTER. I'm talking about the consensus agreement, yes, sir.

Senator McCLELLAN. What did you say just now? You were given two alternatives?

Mr. HOSTETTER. We were given two simple choices: One was to accept the terms as they were proposed without change.

Senator McCLELLAN. Proposed by whom?

Mr. HOSTETTER. Proposed by the proponents of the compromise position, which were those whose name has been ascribed to it, by the OTP. But there were many other forces at play in that compromise, and I think it would require a considerable record to lay before this committee all of the elements of pressure that were brought to bear at that time.

Our choices were quite simply framed as accept the proposal as it is made to you; or run the risk that the FCC rules to allow the cable industry to grow and expand would be denied us, that the freeze would be continued and that passage of a copyright bill might be obstructed. I think given that "Hobson's choice," we made the only possible decision.

I would point out to you that it was under extreme pressure, the kind of pressure which nearly fractured the industry and the association into unreconcilable parts.

The second point that I would——

Senator McCLELLAN. Do you want to identify that pressure?

Mr. HOSTETTER. I do not feel this is the appropriate forum to identify individuals. I just want the record to be clear that——

Senator McCLELLAN. Well, it's not very clear if that's all you're saying.

All right. Proceed.

Mr. HOSTETTER. Well, the offices of the administration involved with communications affairs, most specifically Dr. Whitehead's office, felt that this was a reasonable reconciliation of cable interests and broadcast interests. And it was delivered to us as the terms on which cable would be allowed to proceed with construction of new markets.

And in that framework, we felt we had no choice but to accept those terms.

The second point that I thought was——

Senator McCLELLAN. Well, we may want further explanation of this.

Mr. HOSTETTER. The second point that was raised this morning related to why compulsory arbitration is not, in our judgment, at this time, a satisfactory resolution. Quite simply stated, there are four reasons that I would offer for that position.

One, the period of extensive negotiation which has gone on with the motion picture owners has indicated that there is very little factual basis on which to make a determination of fees. I believe that the record put before you this morning, particularly the record of Mr. Mitchell, gives you all of the information that any arbitrator could have before him in making this determination.

So I do not believe there could be any expansion of knowledge by submitting the issue to what would be a time consuming and expensive process of arbitration.

Second, it is essential that CATV systems pay royalties; and as was pointed out this morning, that may seem a very surprising position for NCTA, as a trade association, to take. However we have been badgered and beaten with the specter of being parasites on the existing communication system. We have had it quite simply laid out for us by the FCC, that if we are to have an environment in which we can grow and expand, one of the absolute essential conditions is the payment for copyrights.

So we at this point are eager to find a fee schedule on which we can move forward and avoid the delay, which I think has been previously testified to, which would be associated with extended arbitration.

Third, a proposition has been posed—that we might concede liability, let a tribunal go forward with the arbitration, and accept their fee schedule retroactively—as a way to go over the second problem of delay that I raised.

To me, it's absolutely unthinkable in light of the financial requirements of this industry. It surprises me that anyone with any financial sophistication would suggest that approach. Clearly the bankers, and the investment banks who we look to for our funding are not going to provide money to this industry when we have conceded liability, but do not know the amount of that liability.

Fourth, it seems to me that at this point in time if an industry which had previously not been liable is to accept liability, we ought to have the certitude of a fixed time in which it will begin, and a fixed fee for some period, until the conditions which might result from arbitration would apply.

I think this is the only appropriate way for an industry previously not subject to liability to make a transition into what is at best an unknown business condition.

Senator McClellan. Let me make an observation and a comment on that. Some of the opposition to the fees proposed in the pending bill contend that by setting a fee here, even an interim fee of 1 to 5 percent, pending the royalty board making its final decision, that such a fixed fee, interim fee by the Congress in this bill would carry with it the implication or be persuasive to the arbitration or to the royalty board that Congress thought this fee was a reasonable and proper fee; and thus, would place the other side at a disadvantage.

Now, do you want to comment on that?

I think it is fair to ask you that. It is a part of the concern or the expressed concern of the other side.

Mr. Hostetter. I think it is—certainly the record in this legislation will show, given the diversity of points of view between the parties at interest here, that there were no hard facts developed and presented on which the committee could make definitive answers. And I think it will be very easy, in this record, to establish that this fee schedule has no precedental value.

Senator McClellan. I think this record should reflect that I don't think anyone here may have a better idea. One may have a better guess than the other.

But at the moment, it seems to me it is rather speculative as to what is the correct, proper, equitable fee that should be established.

Mr. Hostetter. Absolutely agreed.

Senator McClellan. I think the record should reflect that it is to some extent, arbitrary, if we pick this amount, these fees of 1 to 5 percent; yes, it is somewhat arbitrary, because as the record reflects over and over no one seems to have the correct answer on what should be the permanent answer to it as of this time.

And so, whatever we do—if we should pass the bill in its present form or in any form fixing a fee pending the final resolution of the issue by some tribunal, that we may establish by arbitration—that this fee should be regarded as what it is, an interim fee, a stopgap measure, something that will establish the principle of law; that there is a proprietor's right that reaches to the cable operators and one that they will have to honor, acknowledge and make compensation for.

To whatever that compensation should be, if we pass the bill in the present form, it establishes that principle as a principle and a matter of law, but it does leave open, and that is the intent of it, to leave open the amount of the charge of the fee to be fixed subject to decision of a proper tribunal that would be established and subject to facts and information that would support the decision of that tribunal.

All right. You may proceed.

Mr. HOSTETTER. We agree with you on that point. We have no objection to the statement you have just made.

In fact——

Senator MCCLELLAN. I make it because that is the way I feel about it as a member of the committee, so as to put this record in its proper perspective. It is not the purpose of this committee, and I am sure I speak for them, to impose a condition or pressure on the arbitrators, whoever they are, or whatever a tribunal finds in establishing the fee.

Mr. HOSTETTER. If you will excuse that digression, I think we should now go back to the association's comments on the sports blackout.

Senator MCCLELLAN. All right. You may proceed.

I will take into consideration I have used some of your time.

Mr. HOSTETTER. I wish to address my comments to subsection 111(c)(4)(C) of S. 1361, which is the cable sports blackout provision of the proposed revisions of the Federal copyright statute.

At the outset, I want to emphasize the total uniqueness of the sports blackout provision. The section 111 of the bill establishes a scheme of copyright liability for secondary transmission by cable television systems. Under this scheme, some secondary transmissions would be exempt from copyright liability; others would be subject to compulsory licensing; and some would become actionable as acts of infringement absent voluntary licensing by the copyright holder.

With the exception of the sports blackout provision, the liability of various secondary transmissions depends solely upon such factors as the classification of the primary broadcast station, the location of the cable television stations, the types of broadcast signals available in the market, the existence of exclusivity agreements, and certain notices and payment provisions required by cable systems.

What makes the sports blackout provision unique is that it is the only provision in section 111 which makes a distinction based upon the program content of the secondary transmission. Except for sports programing, all types of commercially broadcast programs are treated in the same manner in determining whether their secondary transmission will be subject to a compulsory license. Only sports programing receives special treatment.

I wish to make clear that, as others have already testified, the cable industry supports the concept of compulsory licensing for secondary transmission with payment of a reasonable fee for such licenses. I submit, however, that it would be unreasonable and a disservice of the public interest for the Congress to treat sports programing differently in section 111 from other programing, and to deny cable systems compulsory licenses for carriage of such programing where they would otherwise exist.

As subsection 111(c)(4)(C)(iii) is now written, the sports blackout provision would prevent the carriage by a cable system of a live professional team sports event—which otherwise would be carried—if an authorization to broadcast that event has not been granted to any of the broadcast stations within whose local service area the system is located.

What is the purpose of that provision? The cable sports blackout provision in this bill appears unrelated to the rationale and purpose of the exemption from antitrust laws granted by Public Law 87-331.

Both the House and Senate Committees on the Judiciary clearly stated that the purposes of that legislation were: (1) To enable the member clubs of a professional football, baseball, basketball or hockey league to pool their separate rights without violating the antitrust laws; and (2) To prevent such package contracts from being used to impair college football receipts; notable for its absence is reference to protecting home gate of professional teams.

Subsection 111(c)(4)(C), as now written, concerns neither pooling arrangements to help weaker clubs in a league, nor protection of college football receipts.

If the proposed subsection is intended to protect the gate receipts for home games of professional sports teams, it would mark a new affirmative congressional policy. While section 2 of Public Law 87-331 permits limited blackout provisions in pooling arrangement contracts exempted from the antitrust law, Congress has not thereby attempted to protect home gate receipts. Rather its intent was to limit blackout agreements.

In explaining the meaning of section 2 of Public Law 87-311, Representative Celler stated:

> Mr. Speaker, Section 2 of the bill contains the first of two significant limitations on the antitrust exemption provided by the bill. Section 2 states that the antitrust exemption shall not apply to any joint agreement transferring television rights which prohibit the televising of any game in any area, except in the home territory of a member club on a day when that club is playing a game at home. The effect of Section 2 is to allow only so much of a blackout as was recognized as reasonable by the judge in the particular case.

Mr. Speaker, the Department of Justice, although opposed to the enactment of legislation of this character, has stated, that if the committee believes that a bill along these lines is in the public interest, it should include a limiting provision of the nature of section 2.

Similarly the House report states:

> This section is designated to deny the antitrust exemption with respect to joint agreements transferring league television rights which prescribe a blackout of any territory, except in the situation in which Judge Grim recognized such blackout as reasonable, namely, in the home territory of a member club on a day when that club is playing a game at home.

Congress was thus not attempting to protect the home gate by including section 2. Rather, Congress created an antitrust exemption in section 1 in order to protect the weaker teams in the league who were unable to sell television rights individually. Section 2 was then inserted solely for the purpose of limiting the scope of that exemption by stating that the exemption would not be available if restraints were placed on the television broadcast of professional games; unless the restraint were consistent with the ones recognized as reasonable by Judge Grim in *United States* v. *National Football League*. It is therefore my opinion, that as written, the blackout rights provided in this bill go beyond any previously established congressional intent.

If the proposed cable sports blackout provision represents a new policy to protect home gate receipts, I would suggest that this committee give careful consideration to such a policy; at a time when most professional sports teams are playing to record attendance, I do not believe that the public interest is served by denying the public reasonable access to sporting events through secondary transmissions via cable systems.

I would further suggest that any benefits which such a blackout provision might provide the weaker teams would be more than offset by the detrimental impact such a provision would have on the growth of cable television and the availability of programing to the general public. I submit that a blanket policy of protecting home gate receipts for all professional team sports, without regard to the existing financial health of particular sports, is unwarranted and unnecessarily restrictive.

If this committee, however, believes that it is a necessary national policy to protect the home gate receipts of professional sports teams, then I believe due care should be addressed to the existing overbreadth of subsection 111(c)(4)(C). Congress in the past chose to explicitly limit blackouts to what a court said was reasonably necessary to protect gate receipts. Surely nothing more is required here.

The following are some of the aspects of the subsection's overbreadth. First, it is not limited to days on which a team in the market is playing at home. Indeed, it is not even limited to markets which have a local team in the league, or even the sports, to which the blackout would apply.

Second, it applies even where none of the local stations is interested in broadcasting the event in question.

Third, it is not limited to the geographic are critical to home gate receipts. When the limitation on the antitrust exemption was debated, cable television with its unique ability to pinpoint audiences, was not considered.

Cable differs significantly from television broadcasting which transmits to the public for up to a radius of 60 miles. Since once broadcast, the signals of a television station are not selectively blocked, the only practical solution to protecting home-draw available to the courts and the Congress, at that time, was to permit the blackout of broadcasts by local stations in the team's market when the team was at home.

The incidental but necessary effect of this approach was to black out an area much larger than was necessary to protect the home territory. Since the reach of a cable television system is limited to its own community, blackout provisions applicable to cable television can and should be limited to the geographic area reasonably necessary to protect the homegate.

Now, if I may make an aside to my prepared text, that paragraph is a little complicated, and I think it may be more understandable if we take a specific example.

The football leagues, for example, generally attempt to black out stations for a 75-mile radius around the stadium. Given the fact that a television station broadcasts approximately 60 miles, a station right at the edge of that black-out ring, that is 76 miles from the stadium, will put a receivable signal back to within 16 miles of the stadium. Thus by their actual practice, what the teams are saying is that they want an area of 10 to 15 miles around their stadium to be blacked out from television reception. Thus, in practice they have voluntarily chosen to define their home market and blackout a 10- to 15-miles radius not a 75-mile radius.

Since cable does not radiate signals, you could have a cable system 16 to 18 miles from the stadium in the community that receives signals coming in from a station at the fringe of the 75-mile ring, which would not be allowed reception under this bill, but by the actual practice of the league, and I believe we can take their practice as indicative of their voluntary judgment, to be nonthreatening to their homegate receipts.

A specific example in point is the New York Giants games which are broadcast on the Hartford television station WTIC–TV, which is approximately 100 miles from New York City. The grade B contour of that television station comes back to within 25 miles of New York City proper. Thus a great deal of Westchester County and southern Connecticut presently receives the Giant's games off-air from Hartford.

Returning to my text we submit that the problems of defining the area of protection, which may differ from sport to sport, market to market, and year to year, as well as the ability to grant waivers for equitable reasons, demands a flexible approach to regulation which cannot adequately be met by the necessary rigidity of copyright legislation.

Some flexibility could be provided by the Federal Communications Commission, and we believe that delegating appropriate authority to the FCC for regulation in this area would be far more appropriate than giving professional sports programing rigid, preferential treatment in copyright legislation.

If notwithstanding the foregoing, this committee believes that some form of preferential treatment for sports programing is necessary in this bill, then I suggest the following alternative for a sports blackout provision:

> A cable system, located within the urbanized area of a city in which a professional baseball, basketball, football, or hockey team is permanently headquartered, which carries secondary transmission of distant stations pursuant to a compulsory license as provided for herein, may be required to delete programs on such signals embodying home games of such team, if the home team or its league has made the game unavailable to all television stations which serve the city in which the cable system is located.
>
> Cable systems in existence on the date of enactment of this act shall not be required to delete such programs.

Thank you for your courtesy and consideration.

Senator McClellan. All right. Thank you, Mr. Hostetter.

All right. The next witness, Mr. Bradley.

Mr. **Bradley**. My name is Rex A. Bradley. I am president of TeleCable Corp. with offices at 740 Duke Street, Norfolk, Va. I am also a member of the board of directors of the National Cable Television Association.

TeleCable, my company, is the 16th largest cable television company in the United States, and through its subsidiaries operates 33 cable television systems located in South Carolina, Georgia, Alabama, North Carolina, West Virginia, Illinois, Wisconsin, Virginia, and Kansas.

Because the members of the public who avail themselves of my company's cable television services desire more diverse programing at more convenient viewing times, I am vitally interested in those sections of S. 1361 which affect cable television operations.

It is my understanding that subsection 111(c)(4)(C) provides a sports blackout applicable to the reception and distribution of television broadcast signals by cable television systems. It is to that specific subsection that I wish to address my comments.

While I am not a lawyer, I understand that professional football, baseball, basketball, and hockey clubs have been afforded special treatment under the Federal antitrust statutes, to enable them to pool their separate rights for television and radio broadcasting without violating the national anticompetitive policy, and also to prevent such pooling contracts from being used to impair college broadcast receipts.

If the sports blackout subsection is enacted as presently written, a cable television system in a television market would be prevented from carrying a live professional sporting event if an authorization to broadcast that event has not been secured by a broadcast station within the local service area of which the cable system is located.

I believe that this cable sports blackout provision goes far beyond a restatement of the existing national antitrust policy, and is unrelated to the reasons for, and the purposes of, the exemption from the antitrust laws granted by Public Law 87–331.

Furthermore, in the context of this copyright bill, only sports programing receives special treatment; all other types of commercially broadcast programs are treated the same in determining whether their secondary transmission will be subject to a compulsory license.

I have examined my own company's cable television systems signal complement in the light of the proposed sports blackout provision and I find that 21 of the 33 systems would be immediately, and adversely, affected. Furthermore, it is my opinion that almost every new cable television station would also be seriously affected.

As I understand the purpose of the antitrust exemption, it was, first, to allow pooling arrangement so that the draw area of certain types of professional sports teams could be protected. This area has not been clearly defined. It is sometimes called the home territory.

I believe that an appropriate area would be the urbanized area, as defined by the U.S. Census Bureau, which is an area sufficiently large to protect a home team's gate receipts, if protection is deemed necessary.

I am sure that this committee is aware, however, that there is much debate about whether such protection is necessary. I understand that Senator Pastore has introduced S. 1841, a bill which would place a 1-year moratorium on such blackouts under certain circumstances.

Further, the Federal Communications Commission has under consideration, in docket 19417, proposed rules which will deal with the carriage of sports events by cable television systems.

In these circumstances, the expansion of the blackout area from the home territory necessary to protect the gate receipts of certain sports teams to the service area of a television station, an area encompassing hundreds of square miles, would be most unwise. It seems to me to be better public policy to refine the antitrust exemption rather than to place such rigid concepts in a copyright revision bill.

I also believe that the exemption to the antitrust statutes identifies only four major team sports: football, baseball, basketball, and hockey. The language of the sports blackout provision in S. 1361 would expand that protection to all professional team sports, from soccer to the roller derby—if that is a sport.

If it was the judgment of the Congress that restrictions should be placed on the extent of the exemptions to our antitrust laws, which I believe is a valid and necessary one, there has been little or no justification, in the public interest, to reverse that judgment. If for no other reason alone than to limit the erosion of our antitrust laws, the present sports blackout provision of S. 1361 should be rejected.

The antitrust exemption was designed to protect a local member club on the day when it was playing at home from a broadcast of that home game. As I read the sports blackout provision of this bill, any sports event will be blacked out unless it is being broadcast by a local television station.

In my experience a Redskin fan is a Redskin fan, and carriage of a Philadelphia Eagles-New York Giants game on a cable system in Rockville, Md., even if that game is not broadcast by a Washington television station, will not keep the New York Giants' fan from Kennedy Stadium, if he can get tickets to the game.

If this sports blackout provision is enacted as written, it will require cable television systems to blackout broadcasts of Ram-Fortyniners games in towns as far away as Lexington Park, Md., unless it is carried on a local station. I cannot see how this is consistent with the present antitrust exemption or how it serves the public interest.

It is my understanding that the antitrust exemption provides protection only when a football, baseball, basketball, or hockey team, through its league, has prohibited a local broadcast. The blackout provision here would go further.

Even if a team or league had offered the program to a local television broadcaster, who had turned it down for one reason or another, that game could not be carried by importing a television station from a more distant city which had decided to broadcast the game. Here the standard is that the local station must have received, in hand, authorization to broadcast the game.

How does it serve the public's interest to prohibit the carriage of a team sports event if the local broadcaster chooses not to get broadcast authorization? It seems clear to me that this provision also ranges beyond existing public policy or antitrust statutory exemptions.

I think it is well to remember that the sports blackout would be an illegal conspiracy in restraint of trade without the statutory exemption. It is submitted that when football teams alone receive almost $70 million this year from radio and television stations for broadcast rights, and advertisers are charged $210,000 a minute for their messages during the Super Bowl, the sports blackout need not be further expanded.

In any event, cable television viewers in mostly remote and rural areas have come to depend on a variety of sports for part of their television entertainment. It would not be in the public interest to deprive viewers of programs to which they have become accustomed over a period of many years.

Last, I believe that in the rapidly developing fields of professional sports and cable television, it would better serve the public interest to provide a mechanism which would remain flexible, so that changes in the public interest could be accommodated. By deleting the present sports blackout provision and leaving regulation of the carriage of such programs to the Federal Communications Commission, that mechanism can be achieved.

As FCC Chairman Dean Burch testified last year, before the Senate Subcommittee on Communications of the Committee on Commerce——

Senator McClellan. You have already gone over your time.

Mr. Bradley. In his statement, Chairman Burch pointed out that the public was better served by the access to the broadest possible range of programing made available to the largest public. He stated that impact on sports teams "must, of course, be balanced against the desire of the public for the most diverse possible menu of sports programing."

I believe that it is highly unfair to the American public to further deprive them of the right to watch televised events of the professional sports business.

I respectfully urge this subcommittee to remove section 111(c)(4)(C) from this bill.

Thank you for the opportunity to be heard.

Senator McClellan. Thank you gentlemen.

[The prepared statement of Mr. Hostetter and Mr. Bradley follow:]

Statement of Amos B. Hostetter, Jr., Chairman, National Cable Television Association, Inc., Before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary

I am Amos B. Hostetter, Chairman of the National Cable Television Association, with offices at 918 16th Street, N.W., Washington, D.C. 20006. I wish to address my comments to Subsection 111(c)(4)(C) of S. 1361, which is the cable sports blackout provision of the proposed revisions of the federal copyright statute.

At the outset, the total uniqueness of the sports blackout provision must be emphasized. Section 111 of the Bill would establish a scheme of copyright liability for secondary transmissions by cable television systems. Some secondary transmissions would be exempt from copyright liability; some would be subject to compulsory licensing; and some would become actionable as acts of infringement absent voluntary licensing by the copyright holder.

With the exception of the sports blackout provision, the liability of various secondary transmissions depends solely upon such factors as the classification of the primary broadcast station, the location of the cable system, the types of broadcast signals available in the market, the existence of exclusivity agreements, and certain notices and payments required by cable systems. What makes the sports blackout provision unique is that it is the *only* provision in Section 111 which makes a distinction based upon the program content of the secondary transmission. Except for sports programming, all types of commercially broadcast programs are treated the same in determining whether their secondary transmission will be subject to a compulsory license. Only sports programming receives special treatment.

I wish to make clear that, as others have already testified, the cable industry supports the concept of compulsory licensing for secondary transmissions with the payment of reasonable fees for such licenses. I submit, however, that it would be unreasonable and disserving of the public interest for the Congress to treat sports programming differently in Section 111 from other programming, and to deny cable systems compulsory licenses for carriage of such programming where they would otherwise exist.

As Subsection 111(c)(4)(C)(iii) is now written, the sports blackout provision would prevent the carriage by a cable system of a live professional team sports event—which otherwise would be carried—if an authorization to broadcast that event has not been granted to any of the broadcast stations within whose local service area the system is located. What is the purpose of this provision?

On its face, the cable sports blackout provision is unrelated to the rationale and purpose of the exemption from the antitrust laws granted by Public Law 87–331 (15 U.S.C. § 1292). Both the House and Senate Committees on the Judiciary clearly stated that the purposes of that legislation were (1) to enable the member clubs of a professional football, baseball, basketball or hockey league to pool their separate rights without violating the antitrust laws and (2) to prevent such package contracts from being used to impair college football receipts.[1] Subsection 111(c)(4)(C) concerns neither pooling arrangements to help weaker clubs in a league, nor protection of college football receipts.

The proposed subsection is also far too broad to be intended to protect the gate receipts for home games of professional sports teams; and if it were so intended, it would mark a new affirmative Congressional policy. While Section 2 of Public Law 87–331 permits limited blackout provisions in pooling arrangement contracts exempted from the antitrust law, Congress was not thereby attempting to protect home gate receipts. Rather, its intent was to limit blackout agreements.

In explaining the meaning of Section 2 of Public Law 87–331, Representative Celler stated:

"Mr. Speaker, section 2 of the bill contains the first of two significant limitations on the antitrust exemption provided by the bill. Section 2 states that the antitrust exemption shall not apply to any joint agreement transferring television rights which prohibit the televising of any game in any area, except in the home territory of a member club on a day when that club is playing a game at home. The effect of section 2 is to allow only so much of a blackout as was recognized as reasonable by the judge in the particular case.

"Mr. Speaker, the Department of Justice, although opposed to the enactment of legislation of this character, has stated, that if the committee believes that a bill along these lines is in the public interest, it should include a limiting provision of the nature of section 2."

Similarly, the House Report states:

"This section is designated to deny the antitrust exemption with respect to joint agreements transferring league television rights which prescribe a blackout of any territory, except in the situation in which Judge Grim recognized such blackout as reasonable, namely, in the home territory of a member club on a day when that club is playing a game at home."

Congress was thus not attempting to protect the home gate by including Section 2. Rather, Congress created an antitrust exemption in Section 1 in order to protect the weaker teams in the league who were unable to sell television rights individually. Section 2 was then inserted solely for the purpose of limiting the scope of the exemption by stating that the exemption would not be available if restraints were placed on the television broadcast of professional games—unless the restraint was the only one recognized as reasonable by Judge Grim in *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

If the proposed cable sports blackout provision represents a policy to protect home gate receipts, I would suggest that this Committee give careful consideration to such a policy. At a time when most professional team sports are playing to record attendance, I do not believe that the public interest is served by denying the public reasonable access to sporting events through secondary transmissions via cable television. I would further suggest that any benefits which such a blackout provision might provide the weaker leagues would be more than offset by the detrimental impact such a provision would have on the growth of cable television. I submit that a blanket policy of protecting home gate receipts for all professional team sports, without regard to the existnig financial health of particular sports, is unwarranted and unnecessarily restrictive.

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[1] H.R. Rep. No. 1178, 87th Cong., 1st Sess. (1961); S. Rep. No. 1087, 87th Cong., 1st Sess. (1961).

If this Committee, however, believes that it is necessary national policy to protect the home receipts of professional sports teams, then I believe due care should be addressed to the existing overbreadth of Subsection 111 (c)(4)(C). Congress in the past chose to limit blackouts to what was reasonably necessary to protect gate receipts. Surely nothnig more is required here.

The following are some of the aspects of the subsection's overbreadth. First, it is not limited to days on which a team in the market is playing at home. Indeed, it is not even limited to markets which have a local team in the league, or even the sports, to which the blackout would apply. Second, it applies even where none of the local stations is interested in broadcastnig the event in question. Third, it is not limited to the geographic area critical to home gate receipts. When the limitation on the antitrust exemption was debated, cable television with its unique ability to pinpoint audiences, was not considered. It differs significantly from television broadcasting which transmits to the public for up to a radius of sixty miles. Since once broadcast the signals of a television station are not selectively blocked, the only practical solution to protecting home "draw" available to the Courts and the Congress, at that time, was to permit the blackout of broadcasts by local stations in the team's market when the team was at home. The incidental but necessary effect of this approach was to black out an area much larger than was necessary to protect the home territory. Since the reach of a cable television system is limited to its own community, blackout provisions applicable to cable television can and should be limited to the geographic area reasonably necessary to protect the home gate.

We submit that the problems of defining the area of protection, which may differ from sport to sport, market to market, and year to year, as well as the ability to grant waivers for equitable reasons, demand a flexible approach to regulation which cannot adequately be met by the necessary rigidity of copyright legislation. Such flexibility could be provided by the Federal Communications Commission, and we believe that delegated appropriate authority to the FCC for regulation in this area would be fare more appropriate than giving professional sports programming rigid, preferential treatment in copyright legislation.

If some form of preferential treatment for sports programming is deemed necessary by this Committee, then I suggest the following alternative for a sports blackout provision:

"A cable system, located within the urbanized area of a city in which a professional baseball, basketball, football, or hockey team is permanently headquartered, which carries secondary transmissions of distant stations pursuant to a compulsory license as provided for herein, may be required to delete programs on such signals embodying home games of such team, if the home team or its league has made the game unavailable to all television stations which serve the city in which the cable system is located. Cable systems in existence on the date of enactment of this ACT shall not be required to delete such programs."

Thank you for your courtesy and consideration.

STATEMENT OF REX A. BRADLEY, PRESIDENT, TELECABLE CORP., BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY

My name is Rex A. Bradley. I am President of TeleCable Corporation with offices at 740 Duke Street, Norfolk, Virginia 23510. I am also a member of the Board of Directors of the National Cable Television Association, Inc. TeleCable is the sixteenth largest cable television company in the United States which, through its subsidiaries, operates thirty-three cable television systems located in South Carolina, Georgia, Alabama, North Carolina, West Virginia, Illinois, Wisconsin, Virginia and Kansas. Because the members of the public who avail themselves of my company's cable television services desire more diverse programming, at more convenient viewing times, I am vitally interested in those sections of S. 1361 which affect cable television operations.

It is my understanding that Subsection 111(c)(4)(C) provides a sports blackout applicable to the reception and distribution of television broadcast signals by cable television systems. It is to that specific subsection that I wish to address my comments.

While I am not a lawyer, I understand that professional football, baseball, basketball and hockey clubs have been afforded special treatment under the Federal antitrust statutes, to enable them to pool their separate rights for television and radio broadcasting without violating the national anticompetitive policy, and also to prevent such pooling contracts from being used to impair college broadcast receipts.

If the "sports blackout" subsection is enacted as presently written, a cable television system in a television market would be prevented from carrying a live professional team sports event if an authorization to broadcast that event has not been secured by any broadcast station within the local service area of which the system is located.

I believe that this cable sports blackout provision goes far beyond a restatement of the existing national antitrust policy, and is unrelated to the reasons for, and the purposes of, the exemption from the antitrust laws granted by Public Law 87-331. Furthermore, in the context of this copyright bill, only sports programming receives special treatment; all other types of commercially broadcast programs are treated the same in determining whether their secondary transmission will be subject to a compulsory license.

I have examined my company's cable television systems signal complement in the light of the proposed sports blackout provision and I find that twenty-one of the thirty-three systems would be immediately, and adversely, affected. Furthermore, it is my opinion that almost every new cable television system would also be seriously affected.

As I understand the purpose of the antitrust exemption, it was, first, to allow pooling arrangements so that the "draw area" of certain types of professional sports teams could be protected. This area has not been clearly defined—it is sometimes called "the home territory"—but I believe that an appropriate area would be the urbanized area, as defined by the U.S. Census Bureau, which is an area sufficiently large to protect a home team's gate receipts, *if protection is deemed necessary.*

I am sure that this Committee is aware, however, that there is much debate about whether such protection is necessary. I understand that Senator Pastore has introduced S. 1841, a Bill which would place a one-year moratorium on such blackouts under certain circumstances. Further, the Federal Communications Commission has under consideration, in Docket 19417, proposed rules which will deal with the carriage of sports events by cable television systems.

In these circumstances, the expansion of the "black-out" area from the home territory necessary to protect the gate receipts of certain sports teams to the service area of a television station—an area encompassing hundreds of square miles—would be most unwise. It seems to me to be better public policy to refine the antitrust exemption rather than place such rigid concepts in a copyright revision Bill.

I also believe that the exemption to the anti-trust statutes identifies only four major team sports: Football, Baseball, Basketball and Hockey. The language of the sports blackout provision in S. 1361 would expand that protection to all professional team sports from soccer to the roller derby. If it was the judgment of the Congress that restrictions should be placed on the extent of the exemptions to our anti-trust laws, which I believe is a valid and necessary one there has been little or no justification, in the public interest, to reverse that judgment. If for no other reason alone than to limit the erosion of our anti-trust laws, the present sports blackout provision of S. 1361 should be rejected.

The anti-trust exemption was designed to protect a local "member club" on the day when it was playing at home from a broadcast of that home game. As I read the sports blackout provision of this Bill, any sports event will be blacked out unless it is being broadcast by a local television station. In my experience a Redskin fan is a Redskin fan, and carriage of a Philadelphia Eagles-New York Giants game on a cable system in Rockville, Maryland, even if that game is not broadcast by a Washington television station will not keep that fan from Kennedy Stadium, *if he can get tickets* to the Redskins' game. If this sports blackout provision is enacted as written, it will require cable television systems to blackout broadcasts of Rams Forty-Niners games in towns as far away as Lexington Park, Maryland, unless it is carried on a local station. I cannot see how this is consistent with the present anti-trust exemption or how it serves the public interest.

It is my understanding that the anti-trust exemption provides protection only when a football baseball basketball, or hockey team, through its league, has *prohibited* a local broadcast. The blackout provision here would go farther. Even if a team or league had offered the program to a local television broadcaster, who turned it down for one reason or another—that game could not be carried by importing a television station from a more distant city which had decided to broadcast the game. Here the standard is that the local station must have received, in hand, authorization to broadcast the game. How does it serve the *public's* interest to prohibit carriage.of a team sports event if the local broadcaster chooses not to get broadcast authorization? It seems clear to me that this provision also ranges beyond existing public policy or anti-trust statutory exemptions.

I think it is well to remember that the sports blackouts would be an illegal conspiracy in restraint of trade without the statutory exemption. It is submitted that when football teams alone receive almost $70 million this year from radio and television stations for broadcast rights, and advertisers are charged $210,000 a minute for their messages during the Super Bowl, the sports blackout need not be further expanded.

In any event, cable television viewers in mostly remote and rural areas have come to depend on a variety of sports for part of their television entertainment. It would not be in the public interest to deprive viewers of programs to which they have become accustomed over a period of many years.

Lastly, I believe that in the rapidly developing fields of professional sports and cable television, it would better serve the public interest to provide a mechanism which would remain flexible, so that changes in the public interest could be accommodated. By deleting the present sports blackout provision and leaving regulation of the carriage of such programs to the Federal Communications Commission, that mechanism can be achieved.

As FCC Chairman Bean Burch testified last year, before the Senate Subcommittee on Communications of the Committee on Commerce:

"The Commission is well aware of the facts of sports blackouts. Each new football season brings us a steady stream of complaints that a particular television station is not televising a particular game because of a blackout provision.

* * * * * * *

"There is also the background matter of cable television and sports blackouts. We instituted a rule making proceeding in the entire area of cable's sports carriage on February 2, 1972, the same day the Commission adopted its new rules for cable television.

"To focus the proceeding, we proposed a specific rule to deal with Section 1292 and requested comment on other possible rules to carry out the purposes of the law as a whole. Under our proposed rule, when a major league football, baseball, basketball, or hockey team is playing at home, a cable system licensed to the home city of a team may not carry a professional game of the same sport *unless it is available on a local station.* (In this event, of course, it must be carried.)"

Chairman Burch pointed out that the public was better served by access to the broadcast possible range of programming made available to the largest possible public. He stated that impact on sports teams "must, of course, be balanced against the desire of the public for the most diverse possible menu of sports programming."

I believe that it is highly unfair to the American public to further deprive them of the right to watch televised events of the professional sports business.

I respectfully urge this Subcommittee to remove Section 111(c)(4)(C) from this Bill.

Thank you for the opportunity to be heard. If you should desire a supplementary statement showing examples of how the purposed sports blackout would affect my company's cable television systems, I would be happy to provide it.

Mr. Brennan. The next witnesses appear on behalf of the National Collegiate Athletic Association.

Senator McClellan. All right, gentlemen. Have a seat.

Mr. Brennan. Gentlemen, you have 12 minutes for your part of the presentation.

Mr. Higgins, would you identify yourself and your associate for the record, sir?

Mr. Higgins. Yes, sir. I am James B. Higgins, athletic director at Lamar University in Beaumont, Tex. I'm speaking to the concerns and interests of the National Collegiate Athletic Association. As a member of the NCAA's Television Committee, and chairman of our cable television subcommittee, I am supposed to keep abreast of our concerns with the cable industry.

Mr. THOMAS. Mr. Chairman, my name is Ritchie Thomas. I am associated with the law firm of Cox, Langford & Brown, Washington counsel for the National Collegiate Athletic Association.

I may say that we understood that we had 15 minutes, so we may go a couple minutes over.

Senator MCCLELLAN. Gentlemen, we do have another vote scheduled for 4:30. We have an hour, but sometimes we ask some questions. And so, if you are through within that hour, I will be satisfied.

I try, in allocating the time, to be as fair as I could, but I realize sometimes presenting a statement the witness feels like he wants to further emphasize his point, he doesn't quite get through, and we try to take those things into consideration.

So you may proceed.

Mr. HIGGINS. Thank you.

I would like to digress in a few places from the prepared statement.

STATEMENT OF JAMES B. HIGGINS, CHAIRMAN, CATV SUBCOMMITTEE, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; ACCOMPANIED BY: RITCHIE T. THOMAS, ESQ., OF COX, LANGFORD & BROWN, WASHINGTON COUNSEL, NCAA

Mr. HIGGINS. The members of the National Collegiate Athletic Association have a vital interest in the cable television provisions of the copyright revision legislation, Senate bill 1361, which is the subject of these hearings, and we appreciate the opportunity to appear today and explain our interest and our concerns.

The provisions ultimately incorporated into this legislation will broadly define the conditions under which cable television systems will be authorized to intercept programing broadcast over the air by television broadcast stations and carry those programs to cable system subscribers who may be located hundreds of miles away from the site of the broadcast.

The NCAA strongly believes that if serious injury to high schools and colleges is to be prevented, the authorization for such secondary transmissions by cable systems must be qualified in two special respects (1) In order to avoid the special and injurious impact unlimited secondary transmissions of broadcast television programs would have in the case of intercollegiate sports, cable systems should be denied authority under the blanket copyright license provisions to make secondary transmission of intercollegiate sports events to areas where they are not carried by local television broadcast stations. And I would like to come back to that point later.

(2) In order to avoid serious erosion of the protection which Congress extended to high schools and colleges in the Telecasting of Professional Sports Contests Act, which is Public Law 87-331, and regardless whether it makes any other specific provision regarding secondary transmission of professional sports events, the legislation should specifically deny cable systems authority to make secondary trans-

missions of professional football games into areas where telecasts are prohibited under section 3 of that act.

A little backround on the NCAA itself. It is voluntary, nonprofit, education organiaztion composed of 771 members of which almost 700 are 4-year colleges and universities. The membership provides intercollegiate competition in 24 different sports in which each year more than 175,000 students compete.

A basic purpose of the association is to initiate, stimulate, and improve intercollegiate athletic programs for student athletes.

Of these sports programs there are only two, in fact only one sports program which makes any money for the colleges. Our football program takes in dollars, and our basketball program just about breaks even at most universities and colleges. Tennis, track, field, swimming, golf, all of the other programs provide no income.

We usually take what, if any, profits we make from our football and basketball programs and support these other programs. In support of these programs, the NCAA members annually spend over $237.4 million in the administration and conduct of intercollegiate competition. As I have pointed out, for most of these institutions, income from attendance from these major sports events is a substantial source of income of economic support for their programs. But there are only about 85 of all these 700 members whose intercollegiate programs are operated in the black. The programs are subsidized by the institutions or the State legislature because they feel that it is important to the national and local interest.

Getting back to point No. 1, in about 1951, the NCAA saw the impact that the media of television was going to have on our athletic programs, and appointed a committee to develop a television plan to control that impact.

We were very much afraid of the impact of television on the instadium attendance.

Now, we'd like to point out that the plan that we operate—I would like to read the purpose of the plan—that this plan is modified, improved, brought up to date every 2 years and it's been in effect now about 22 years. Through this plan, we control our television programing, and it is really more of a plan to protect the members from the impact of television upon the instadium attendance than it is for the dollars it generates.

We state that the purpose of this plan shall be: To reduce as far as possible the adverse effects of live television upon football game attendance, and in turn upon the athletic and related educational programs depending upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to promote college football through the use of television; to advance the overall interest of intercollegiate athletics; and to provide college football television to the public to the extent that they are compatible with these other objectives.

The provision of this plan is that we have about 15 dates a year, 15 Saturdays, in which we telecast football. If we telecast one game each Saturday, that would only accommodate 30 colleges, if they were all different schools. So to spread the exposure and what income is derived, we devised a system where on some weekends we would have regional telecasts. We'd have one game each on the east coast, the west coast, the Midwest, the South, the Southwest, maybe five in all. And we restrict the telecast of these games just to that area, so that there is only one game being telecast in any given area in the United States. We do that, as I stated, to increase exposure so that in all more schools are included and more schools benefit from the income.

However we don't want more than one game on television in any area. That is because we have myriads of colleges, small and large, playing and if we had all of these games on in every area, we would be smothered. A good example of what would happen—relating to my point No. 1—if capable systems were to be able to pick up distance signals of these regional games is provided in my area, in Texas. The only game we might have on local television would be, for instance, Arkansas and Texas Tech. And if I know that telecast is scheduled for a certain time of the day, say they're going to play at 2 o'clock, I schedule my game at night, or if it's going to be at night, I schedule my game that day.

We are going to be bothered by any game that people are interested in, they will be watching it. If cable television comes in, however, they may also pick up the game on the east coast. It might be Penn State-Notre Dame, and start about 11 o'clock in the morning. Next, they will pick up the midwest game, it could be Michigan State-Michigan or LSU-Mississippi, and end up on the west coast with UCLA or somebody like that on the screen until 9 o'clock that night.

There is no place for us to run. Many, many schools and colleges will be disrupted in trying to attract a crowd, and for this reason, we would be in serious trouble. Without express limitations, obviously there would be nothing to prevent that.

My second point concerns the impact of professional games. Under this Public Law 87–331, Congress protected the colleges and high schools from the pros on Saturdays and Friday nights. The law does however, allow them to telecast if there is not a high school or a college game being played in the area.

For instance, Atlanta Falcons are playing up in Minnesota, and the NFL determines there is no college game and no high school game within 75 miles from Atlanta. The market is there and they probably will telecast that game back to Atlanta. And they wouldn't hurt anybody, they wouldn't hurt any high school game or any college game.

If, however, cable comes in, and picks it up off the air—and particularly later when the technology is more advanced, and they are able to interconnect—this game could be carried by interconnecting cable all over the United States into many communities which are trying to have a local school or college football game, whether it was Honolulu or Arizona, or wherever. We think certainly this protection the Congress gave us in Public Law 87–331 should be protected from this kind of erosion by cable.

Returning to telecasts of collegiate sports, as another example, we have the sellout exception. We may have scheduled one game to be shown all over the Nation that day, maybe University of Southern California and Notre Dame. However, the Texas-Oklahoma game in Dallas is sold out. People in Dallas can't get a ticket. People in Norman can't get a ticket, and people in Austin can't get a ticket, and it's not going to be televised.

So the plan allows that game to be televised in only those three communities. Obviously, their supporters should have an opportunity to see it, buy a ticket, or see it on television, and the network which buys our national program, they know this. They say, well, okay, we're going to lose those three markets. That's okay. We are going to buy the program with that limitation.

But what happens and has already happened, a cable company puts up their antenna and picks up the limited telecast and carries it to additional wide areas. I believe the last count—I forget how many thousand homes in the Texas Panhandle and Oklahoma where this Texas-Oklahoma game was pirated and shown. Obviously this hurts local colleges, and the big advertisers, the Chevrolet people, the people who advertise the NCAA package, they wonder why they should be spending their money on the NCAA package when their rival, Ford Motor Co., picked up the Texas-Oklahoma game, which was a whole lot better game, and had a lot more interest. As a result, our package is less valuable.

These are the salient points of our problem.

We think if the limitations we request are not placed on the cable TV systems, then the end result will be less college television. The big schools, the Notre Dames, the Ohio States, the Penn States, the Alabamas and Texas Universities, those people are going to be on television. But the people who will get hurt are the small schools that are getting some exposure because of our plan, because we spread out these exposures.

And if the protection will no longer be there, then those schools who are trying to regenerate in-stadium attendance will suffer. In addition, our plan diverts some of the money to the smaller schools. If no limitations are imposed on secondary transmissions of collegiate sports events, we think our plan will be completely disrupted, and would blow up.

Moreover, we believe that the secondary transmission authority should include a provision which extends to high schools and colleges the same protection in the case of secondary transmission of professional football games by cable systems as that which they now possess from television broadcasts of those games.

And in conclusion, the NCAA strongly believes that the limitations on cable systems' secondary transmission of sports events which we have requested are of vital importance to the colleges, junior colleges and high schools of the United States. We believe that these limitations are in the public interest, and that they must be incorporated into any legislation granting cable systems broad rights to make secondary transmissions of a television broadcast.

Senator McCLELLAN. All right.

Mr. Higgins, thank you very much.

[The prepared statement of Mr. Higgins follows:]

STATEMENT OF JAMES B. HIGGINS, CHAIRMAN, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION CABLE TELEVISION SUBCOMMITTEE, BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS

The members of the National Collegiate Athletic Association has a vital interest in the cable television provisions of the copyright revision legislation (S. 1361) which is the subject of these hearings, and we appreciate the opportunity to appear today and explain our interest and our concerns.

I. INTRODUCTION AND BACKGROUND

The provisions ultimately incorporated into this legislation will broadly define the conditions under which cable television systems will be authorized to intercept programming broadcast over-the-air by television broadcast stations and carry those programs to cable system subscribers, who may be located hundreds of miles away from the site of the broadcast. The NCAA strongly believes that if serious injury to high schools and colleges is to be prevented, the authorization for such "secondary transmissions" by cable systems must be qualified in two respects:

1. In order to avoid the special and injurious impact unlimited secondary transmissions of broadcast television programs would have in the case of intercollegiate sports, cable systems should be denied authority under the blanket copyright license provisions to make secondary transmissions of intercollegiate sports events to areas where they are not carried by local television broadcast stations.

2. In order to avoid serious erosion of the protection which Congress extended to high schools and colleges in the Telecasting of Professional Sports Contests Act (Public Law 87-331)—and regardless whether it makes any other special sports events—the legislation should specifically deny cable systems authority to make secondary transmissions of professional football games into areas where telecasts are prohibited under Section 3 of that Act.

Before turning to a discussion of these points, however, some background information may be useful. The National Collegiate Athletic Association is a voluntary, non-profit, educational organization composed of 771 members, of which 696 are four-year colleges and universities and 75 are allied and affiliated organizations. The NCAA membership provides intercollegiate competition in 24 different sports in which each year more than 175,000 students compete. A basic purpose of the Association is to "initiate, stimulate and improve intercollegiate athletic programs for student-athletes. . . ." *NCAA Constitution*, Art. Two, Section 1 (a).

The NCAA recognizes that "competitive athletic programs of the colleges are designed to be a vital part of the educational system." *NCAA Constitution*, Art Two, Section 2. In support of these programs, NCAA members annually spend, in total, more than $237.4 million in the administration and conduct of intercollegiate competition. For most of the MCAA's member institutions, income from attendance at major sports events is a substantial source of economic support for their total sports programs. Yet there are only approximately 85 colleges in the United States whose intercollegiate programs are operated in the black. For the rest of the NCAA members, athletic programs are operated at a deficit. When income from live gate receipts, television, radio and like sources are deducted, NCAA four-year institutions of higher education are today annually subsidizing intercollegiate athletic competition by approximately $23.3 million. This means that at a time when higher education is faced with grave financial pressures, it is running a deficit of $23.3 million because it thinks sports participation is a valuable educational experience.

We understand that the junior colleges have a comparable experience with the financing of athletic programs, and there are increasing reports of curtailment or elimination of high school extracurricular programs, including sports, as a result of budgetary limitations. Moreover, the finances of many high schools and colleges are such that the loss of just 200 admissions, representing $600 in lost income, would be very significant, and have an effect on the overall athletic program.

Against this background, any action adversely affecting in-person attendance at intercollegiate and interscholastic sports event is a matter of serious concern. Precisely this effect, however, is threatened if cable television systems are to be granted blanket secondary transmission authority without appropriate limitations.

II. LIMITATIONS SHOULD BE IMPOSED ON SECONDARY TRANSMISSIONS OF INTERCOLLEGIATE SPORTS EVENTS

Since 1951, the members of the NCAA have implemented a series of television control plans in order: (1) to reduce the adverse effects of live television upon school and college football game attendance (and, in turn, on the athletic and physical education programs dependent upon the proceeds from that attendance), while (2) at the same time spreading television particiption among as many colleges as possible. The overall objectives have been to advance the interests of intercollegiate athletics and to provide college football television to the public to the fullest extent compatible with other objectives.

The current football television plan calls for network telecasting of Saturday games, with nationwide telecasts of a single game in some weeks and in other weeks a series of regional games being telecast. Opportunity is also afforded for the local telecasting (or cablecasting) on a limited number of stations of games of great interest in a particular college community, under specified circumstances and only if no appreciable damage will be done to any concurrently conducted college game. Friday night telecasts are authorized only if no injury will be done to concurrently conducted college, junior college or high school games.

This arrangement permits a wide diversity of colleges and universities to appear on national or regional television: an average of 55 colleges will appear on network telecasts in any year. Income from such appearances typically is received by other members of the conferences to which the participants belong as well as by the participants themselves, with the result that on the average 220 colleges and universities share in this income each year. Taking local telecasts into account, in 1972, 90 members of the NCAA made 158 appearances on some form of simultaneous television pursuant to the plan. Seventy-four of these appearances were on national television. Twenty-one games were telecast in local areas (ranging from Hartford to Honolulu) under the provisions governing such telecasts.

A somewhat similar plan has been designed in order to permit the telecasting of games in the National Collegiate Basketball Championship, again containing limited restrictions appropriate to provide necessary protection to in-person attendance. In general, the tournament television policy provides that first-round, regional and national finals games may be televised via stations located more than 180 miles from the game site (120 miles in the case of first-round games) and that such games may be televised without geographical restrictions provided the games are sold out at least 48 hours prior to first-round and regional games or 72 hours prior to the finals games. In addition, the basketball telecasting policies of the various intercollegiate conferences, although diverse, generally take account of the impact of telecasts on concurrently scheduled contests.

The vast coverage potential of cable television systems threatens the effectiveness of these control systems, to the extent that cable television systems can and do appropriate the authorized telecasts for proliferated transmission into areas where only measured impact of telecast games upon games in progress is contemplated by the control plans. The premises of the exceptions granted for local telecasting of intercollegiate football games are completely vitiated when a CATV system appropriates the right of the authorized local telecast and carries it into other areas, where local high school or college games are being played. The same result occurs when a cable system carries a basketball championship game into the locality of the game in circumstances where the plan does not provide for local telecasting. The arrangement for regional telecasts will become unworkable, because cable systems able to import games telecast in other regions may carry three or four college games staggered (because of time zone differences) throughout the day on Saturday, greatly increasing the impact on attendance at local games.

As a consequence, these plans would collapse, and there would be less rather than more college sports coverage available to the television viewer. In the case of football, only the top 20 or 30 collegiate football powers would be seen on national television, because without the discipline of these plans both networks and local stations will be principally interested in telecasting the most attractive major college games. Smaller colleges will be effectively denied access to national or regional television, and athletic programs will suffer at colleges and universities, which are not national football powers—including all of the members of conferences which will no longer be represented on national television.

In the case of both of these plans, the principal concern of the NCAA is not the impact widespread cable carriage of the telecasts concerned may have on the revenues from network telecasting. The fundamental problem is the loss of control over—and thus the ability to mitigate—the impact of telecasts of intercollegiate sports events on in-person attendance at local games.

The NCAA believes that these effects can and should be regulated through protection against unauthorized appropriation and transmission of telecasts afforded by the copyright laws. To this end we urge that the modified cable television provisions of S.1361 be fashioned so as to deny cable system authority to make secondary transmissions of intercollegiate sports events into areas where television broadcasts are not authorized, with the result that, unless licensed by agreement of the parties, such unauthorized transmissions will be actionable as acts of copyright infringement and subject to the infringement remedies provided by the bill.

As originally prepared by this Subcommittee, Section 111(c)(4)(C) of the bill would deny authority to make secondary transmissions of a live telecast of an organized professional team sporting event in areas where local stations are not broadcasting that contest. Should this provision be retained in the modified version of the bill, the protection requested by the NCAA could be extended by an amendment to cover amateur sporting events as well. Certainly it seems clear that amateur sports should be given treatment in the bill at least as favorable as that accorded professional sports. Regardless whether special provision is made for professional sports, however, we believe protection of the kind we have outlined is independently justified as required in the best interests of interscholastic and intercollegiate sports programs.

III. CABLE SYSTEMS SHOULD BE DENIED AUTHORITY TO MAKE SECONDARY TRANSMISSIONS OF PROFESSIONAL FOOTBALL GAMES INTO AREAS WHERE TELECASTS ARE PROHIBITED UNDER SECTION 3 OF PUBLIC LAW 87-331

In addition, the NCAA wishes to point out that when Congress gave professional sports clubs a special exemption from the antitrust laws so that they could sell telecasting rights to their games on a pooled basis, it included a provision designed to protect high schools and colleges from the disastrous impact on in-person attendance at their games of conflicting telecasts of professional football games. That provision, (Section 3 of the Telecasting of Professional Sports Contests Act, Public Law 87-331), cancels the antitrust exemption as to any agreement which permits a Friday evening or Saturday telecast of a professional game from a station within 75 miles of a scheduled interscholastic or intercollegiate football game, during the period beginning on the second Friday in September and ending the second Saturday in December.

So long as the copyright revision bill contains an exception from the general copyright authority in the case of secondary transmissions of professional team sporting events into areas where television broadcasts had not been authorized, the provisions of Public Law 87-331 are (at least in part) indirectly imposed on cable systems. Removal of the exception for professional sports telecasts, however, would raise the possibility that CATV systems will be at liberty to carry professional games in direct conflict with high school and college contests.

Under Public Law 87-331, a professional game may be telecast on a Friday night or a Saturday during the protected period so long as no high school or college game is scheduled to be played within 75 miles of the transmission site. Telecasts of professional games may be, and have been, freely made in areas where there are no local high school or college games on the day concerned. It is frequently the case, for example, that NFL games will be telecast nationwide by CBS and NBC in December, avoiding, however, telecasts in areas where local high school or college games are to be played.

Unless the secondary transmission authority is appropriately conditioned, therefore, telecasts of such games could be picked up by cable systems and carried to subscribers in areas many miles from the broadcast site where there are local high school or college games. The effect of the telecasts of professional football games on local high school or college games is well established, and it is clear that the impact of such cable carriage on intercollegiate and interscholastic sports programs would be disastrous.

Accordingly, we believe that the secondary transmission authority should include a provision which extends to high schools and colleges the same protection in the case of secondary transmissions of professional football games by cable systems as that which they now possess from television broadcasts of those games.

IV. CONCLUSION

The NCAA strongly believes that the limitations on cable system secondary transmissions of sports events which we have requested are of vital importance to the colleges, junior colleges and high schools of the United States. We believe that these limitations are in the public interest and that they must be incorporated into any legislation granting cable systems broad rights to make secondary transmissions of television broadcasts.

Mr. **Brennan**. The final witnesses of this hearing are the representatives of the professional leagues.

Would you please come forward.

Would you identify yourself, please, for the record.

Mr. Vanderstar. My name is John Vanderstar. I'm an attorney in Washington for the firm of Covington & Burling representing the National Football League, and I'm appearing here on behalf of Commissioner Rozelle.

Mr. Kuhn. And my name is Bowie Kuhn. I am commissioner of baseball, and here I'm representing the professional baseball.

Mr. Ruck. My name is Don Ruck. I'm vice president of the National Hockey League, and I'm representing the member clubs of the National Hockey League.

Mr. Hochberg. My name is Phillip Hochberg. I am counsel to the National Hockey League.

Mr. Kaufman. My name is Robert M. Kaufman. I'm a member of the firm of Proskauer, Rose, Goetz & Mendelsohn, counsel to the National Basketball Association, and I represent the commissioner of the National Basketball Association.

Mr. Brennan. Commissioner, do you wish to be the first man at bat?

Mr. Kuhn. I would like to. I appreciate the idiom you use, Mr. Brennan.

Mr. Brennan. I'm surprised there is no designated pinchhitter from the two leagues.

Mr. Kuhn. He is doing so well we left him in the stadium and they sent me here alone.

STATEMENTS OF BOWIE KUHN, COMMISSIONER OF BASEBALL, BASEBALL LEAGUES; DON V. RUCK, VICE PRESIDENT, NATIONAL HOCKEY LEAGUE; JOHN VANDERSTAR, COUNSEL, NATIONAL FOOTBALL LEAGUE; ROBERT M. KAUFMAN, COUNSEL, NATIONAL BASKETBALL ASSOCIATION; AND PHILLIP HOCKBERG, COUNSEL, NATIONAL HOCKEY LEAGUE

Mr. Kuhn. Let me say first, Mr. Chairman, I am delighted to be here with you and to give my views to your committee. We have submitted an extensive statement to the subcommittee.

Senator McClellan. Your statement will be printed in the record in full, and you may highlight it.

Do you have others who have statements?

Mr. Brennan. Yes, each of the separate leagues.

Senator McClellan. Each of the witness' statements may be printed in full in the record, and you make your presentation by highlighting your statements and your position as you choose.

Mr. Kuhn. Thank you, Mr. Chairman. I'll just take a few minutes and try to highlight and give some perspective on the statement we have submitted. I'm speaking on behalf of not only Major League Baseball and its 24 clubs, but on behalf of Minor League Baseball and 127 clubs in the 17 leagues in the United States.

We support the copyright revision bill as it has been prepared, and particularly we support section 111 of that bill. I say that for this reason, Mr. Chairman, we feel that the control, which the bill as proposed, would give to professional sports and professional baseball, for whom I speak—is vital to the health of our professional game, and to these 151 cities where we present baseball to the United States.

As you know, I believe, Mr. Chairman, we sell our broadcasting rights on both a national and local basis. We sell a package to the National Broadcasting System for the World Series, the National All Star Game, the Saturday Game of the Week and the Monday Game. We also sell 24 separate local packages. Each major club sells a local broadcasting package to stations or sponsors.

This is a very important part of our business, 25 percent of our revenue, approximately, over the years has come from broadcasting, and I would anticipate that this percentage may very well increase.

It is vital to us that this revenue be protected, and I say that for some very practical reasons, that we in professional baseball are faced with. Today, the overall position of our major league industry is in a loss position financially and has been so for several years. I am hopeful, of course, that this will be changed, but that is a difficult fact that we are presented with today.

Over one-half of our clubs are losing money today in their present operations. They exist and operate because they are operated by men who have a very strong sporting instinct, who are devoted to our game, and who want to be a part of it.

Senator McClellan. Why are they losing money?

Mr. Kuhn. I am coming to that. What I'm going to say, Mr. Chairman, let me jump ahead and say this.

Senator McClellan. All right. You may proceed. I would just like to have some comment about it.

Mr. Kuhn. All right.

The 127 minor league clubs that exist throughout the United States could not exist, and this is a critical part of the answer to your question, Mr. McChairman, without the subsidy provided by the major leagues. The cost of player development——

Senator McClellan. In other words, it is maintaining the farm team that is where the great emphasis——

Mr. Kuhn. Yes; that is correct.

Senator McClellan. They make no profit, do they?

Mr. Kuhn. The minor league clubs? They do here and there, yes; but in the main they do not. An exceptional operation may be profitable but in the main they do not because they exist, again because in 127 or the better part of 127 cities around the country you have as you do in the major leagues, sports-minded people who want to see professional baseball presented in their towns.

And I may say with respect to those 127 minor league towns that in most of them professional baseball is the only professional sport presented, and forms a critically important part of the entertainment for the citizens of those communities. And I would emphasize here the importance of the entertainment.

Senator McClellan. They are not supported by gate receipts alone, are they?

Mr. Kuhn. No; they are not. They're supported by basically two things or perhaps basically three things. They are supported by gate receipts in part. They are supported by concession receipts, which are really important in the minor league, and they are supported by the subsidy provided by the major league clubs to the minor league clubs.

Senator McCLELLAN. And in some instances, they are supported also by public subscription, aren't they?

Mr. KUHN. Yes, sir. They certainly are, and by what might be referred to as the charity of the men who finance the clubs, which is another public subscription.

I think there is a very great danger to professional baseball, if we have uncontrolled telecasting of baseball. The vital part of our broadcast picture at the major league level is this local package that each club sells, that I described a moment ago. These are sold on an exclusive basis, and their value unquestionably is greatly hinged on the ability of the local club, whether it's the Phillies, the Yankees, or whoever, to sell exclusively in their market territory.

If there is a prospect, as we think there is, a dangerous prospect of an infusion of distant signals carrying other baseball broadcasts to these markets, surely the value of these exclusives is going to be greatly diminished. And I might say, Mr. Chairman, that when we telecast our games locally, the main part of our telecasting is away games, about 75 percent of the games that we telecast are our away games, not our home games.

Therefore, we are concerned with the protection of that exclusive of both the away games we telecast as well as the home games we telecast. And we are further concerned, and this is where we see a great danger at both the major- and minor-league levels of the effect on the home games. At both levels, it is the sincere opinion of our operators, and of myself that if there is uncontrolled television coming into the market, our ability to sustain our home gates, as we now sustain our home gates, will be greatly diminished. In other words, it will be a form of competition for home gates.

Now, in the comments I have heard earlier today there was a great emphasis on football, which has the wonderful situation of having largely sold its ballparks at the major league level. That is not true in professional baseball. While our attendance is enormous, we are not able to day-after-day sell our entire ballparks.

And it is of vital importance to us that we maintain the protection of our home gate, and we feel this uncontrolled television coming in would have a very adverse effect upon our home gate. We think the evidence that this is a real danger is quite dramatic from what we have submitted. We have been given some new information that we have developed recently, and the burden of that is this:

Since the new FCC regulations, in the year ended April 1, 1973, 304 CATV permits have been granted by the FCC in major league territories: 304 in major league territories and of those 304, 171 are right in major league cities.

Let me take some specific examples which point up the danger that we think affects it. Take Milwaukee where the Brewers play, and telecast a great many of their games: unless the copyright revision bill is passed with section 111, it will be possible under present regulations to have 277 games now being telecast by the Cubs and the White Sox in Chicago made available for telecast in Milwaukee.

The Chicago Cubs are on WGN. The White Sox are on WSNS. They are both independent stations. The Cubs do 148 of their games annually, the White Sox, 129: 277 total. All of these will be available to go into Milwaukee.

I cannot believe there would be any broadcasting rights of value left in Milwaukee if this should happen. The same thing is true of Minnesota, where the Twins play. All of those 277 games from Chicago would be available to go into Minnesota with a devastating effect, in my judgment, on the operation.

Senator McClellan. Do you have a blackout now against those games?

Mr. Kuhn. No; we do not. These are local games. With our local games, Mr. Chairman, there is no blackout provision at all.

To give you a further example, the Boston Red Sox and the Philadelphia Phillies are on either side of the New York market. Both New York teams telecast on independent stations. Their games would be available to go into both Philadelphia and Boston.

The Mets telecast 112 of their games, the Yankees 69. This is another 181 games that would be free to go into Philadelphia and Boston.

And again, Mr. Chairman, one doesn't need to be a bit sophisticated about this business to know the devastating impact that would have on the broadcast right of the Phillies and the Red Sox if in part or in whole that began to happen, and that it can happen, is demonstrated by a survey that CATV channels are being—the permits are being granted now in these markets, in Boston and Philadelphia. This is not something that we are speculating on, but this is the fact.

And as the CATV grows, and we hope it will, goodness knows where this may go in terms of its total impact; from the point of view of professional baseball, that is a pretty ghastly prospect, unless we are able to control the dissemination of our broadcast rights, and that is all we ask for.

I think it is clear also to look at the realities that the CATV people readily admit that sports broadcasting is vital to them. There is no pretense that they are going to use some other kind of broadcasting; sports broadcasting is what they are hinging their prospect of success on.

In other words, they have said plainly that they intend to go extensively into sports broadcasting.

Now, I think something important in concluding, I should say, Mr. Chairman, is this: I think baseball has behaved very responsibly in terms of its obligations to the public in making its games available. In the first place between the majors and the minors, as I say, we have maintained this enormous entertainment network of 151 clubs and 151 markets around the country.

We play 2,000 major league games. We play 7,300 minor league games. I cannot tell you how important this entire system is. It draws over 40 million people, by far the largest of anything in professional sports. Over 40 million people are drawn to these events.

If we were difficult in our broadcast policies and didn't telecast a lot of these games, then I could say, I think the chairman should say to me, "Well, what have you got to complain about?" We do broadcast our games by television, very extensively. Of our 2,000 major league games nearly 1,100 are telecast annually, and not telecast over just one station, Mr. Chairman. We are currently telecasting over 173 television stations in and around our local markets through our local broadcasting contracts.

Now, if you will look at our national broadcast contract, there we were telecasting regularly over 190 NBC stations in the United States covering the country. There was a game every Saturday during the baseball season and a game on 15 Monday nights during the baseball season. NBC carries our all star game as they did last week, our league champion series and our world series. All of these are carried nationally all over the country.

So that literally hundreds and hundreds of thousands of hours of television time are provided today by major league baseball, I think a very responsible performance in our attempts of serving the public with pictures of our games. We feel that this has been a reasonable and fair performance on our part in terms of the public need and interest.

And I think that it is fair to assume that we will look at newly developing technologies and try to use them, given control of our product as we pray we shall be, and try to use them thoroughly in the public interest as we have in the past; as we have, for instance, with our world series games where there is no blackout. We telecast the world series not only in the cities where those games are being played, but all over the country as well. Knowing occasionally we may get a public relations blackeye because you may see a few empty seats here and there because we will televise right in the market, but we do in trying to serve the public interest and we feel we have behaved very responsibly in this way. So we do support the bill, and we very particularly support section 111.

And I thank you for your consideration.

Senator McCLELLAN. Thank you very much, Mr. Commissioner.

Mr. RUCK. Mr. Chairman?

Senator McCLELLAN. Mr. Ruck, all right.

Mr. RUCK. Yes, sir.

Since hockey and baseball share similar player development problems, we like baseball must develop our own minor league players. We, too, have both our network television contract, extensive local contracts. We will support the remarks made by Mr. Kuhn.

Senator McCLELLAN. Thank you, sir.

Mr. BRENNAN. Mr. Vanderstar of the National Football League.

Mr. VANDERSTAR. Mr. Chairman, I have submitted a statement on behalf of Commissioner Rozelle of the National Football League. Essentially what it does is warmly endorse and urge the enactment of those provisions in this bill which deal with carriage of sports on cable systems, in particular 111(c)(4)(C).

We have made a record before the committee and also before the Communications Commission about our need for this. We have tried to show that contrary to the comments repeatedly made by the cable industry, the purpose of Congress in 1961 in enacting Public Law 87–331 was to give the professional sports leagues the privilege to sell their games on a pool or joint package basis to a single network.

Congress knew full well then when it enacted that exemption from the antitrust laws, that in allowing, in our case the NFL, to do that, we would be selling games in a fashion that would result in one game being telecast in each market.

Now, with the growth of more teams, with the amalgamation of the two leagues and so on, we are now in a position where in every market in the United States on Sunday afternoon there are two, and in most of them three, live telecasts of professional football games available to the viewing audience.

We think, and a good many other people think, that is plenty of professional football on television. We have structured the distribution of those games in a way that we think serves the public interest for a variety of reasons, and what we ask is that we be allowed to continue to do that, that we not lose control of any distribution of this product for financial reasons and other reasons as well, and that we not see cable systems allowed to continue and increase the practice of simply moving game telecasts throughout the country to suit their own interest and convenience, rather than ours or the public's, as we see it.

That is our position.

Senator McClellan. Thank you, very much.

For the record, the Chair observes we are going to have a rollcall vote, only it came quicker than I thought, so I'm going to have to leave in a moment. If you can finish real quickly.

Mr. Kaufman. Mr. Chairman, we have submitted for the record the statement of Commissioner Kennedy of the National Basketball Association strongly supporting the provisions of the bill as they are.

I would like to point out two things, if there is time, that the committee should take into consideration. Professional basketball games like other professional games discussed here are not produced primarily for television. They do have a unique character. They are different from the other types of broadcasting material, to which the cable people refer.

They do not have a potential for reuse that other types of entertainment programs may have. They do not have the type of national acceptance with respect to a particular game; and for that reason, they do deserve special consideration.

Here we would also like to point out that there has been a discussion of the antitrust exemption which is, in our view, not quite complete. The antitrust exemption that was granted was granted with respect to pool broadcasts, because one was thought to be needed. No one ever felt that the decision of a team on a single basis to sell one game and not to sell another game needed congressional support.

And the marketing plans of the individual members of the National Basketball Association in their single game sales on a nonleague basis have been that they would sell as many games as possible without interfering with attendance.

The problem that they face with the cable situation is that the game which has been not sold at home, but which the visiting team is allowed to take back, was not sold for a specific economic reason, which was to preserve the gate. The cable proposes to bring that game back into the home team area, and in effect, to destroy the gate, which the team is trying to protect.

It places a terrible burden on the team to decide whether it will exclude the cameras of the away team in order to protect its very existence in terms of ticket sales, and that is a choice to which sports should not be put. The only result would be to deprive people of the ability to watch sports and not to add to the number of games that they receive. I think that is a point which should be taken into account.

Also, I would join with the other sports in the support of the bill in its present form.

Thank you, Mr. Chairman.

Senator McClellan. All right.

Thank you very much.

[The prepared statements of the Professional Baseball Leagues, National Hockey League, American and National Football League and the National Basketball Association follow:]

Statement on Behalf of Major League and Minor League Baseball, by Bowie K. Kuhn, Commissioner of Baseball, Before the U.S. Senate Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights, in Support of S. 1361

Mr. Chairman, I appear here today in strong support of the provisions of Section 111(c)(4)(C) of S. 1361. I am appearing on behalf of the 24 Major League Clubs of both the American and the National Leagues as well as the 127 Minor League Clubs comprising Professional Baseball's system of 17 Minor Leagues.

The matter before the Subcommittee, of course, is the Copyright Revision Bill, S. 1361, for the general revision of the copyright law.[1] Those portions of Section 111 which we support would, in effect, allow professional sports organizations like Baseball to continue to determine when and where their sporting events will be telecast.

Specifically, Section 111(c)(4)(C) of S. 1361 would ensure that professional sports will retain complete control over the transmission of a Club's games by cable television.

As you know, Professional Baseball over the past few years has provided this Subcommittee and successive Congresses dealing with the problem of copyright revision detailed evidence that the indiscriminate transmission of sports signals by cable television systems could do serious violence to attendance at Major League and Minor League games as well as critically undermine telecasting revenues upon which Professional Baseball's economic viability clearly depends.

I appear here today for two compelling reasons:

(1) To urge the Subcommittee to hold fast to the letter and the spirit of Section 111(c)(4)(C) as the Subcommittee has drafted it and as the Subcommittee reported it when it last took formal action on the bill.

(2) To submit, for the Subcommittee's record, a detailed survey constituting dramatic new evidence illustrating that the uncontrolled and unlimited transmission of sports broadcasts by cable systems could totally disrupt Baseball's historic local and regional telecasting patterns—with the most serious consequences for Baseball's future.

At the outset, nevertheless, I want to emphasize that there are obvious public interest benefits inherent in the newly emerging cable television technology. Cable offers an opportunity for extending more programming, and more programming choices, to the American viewing public, especially in rural and other under-served areas. We will be most aware in times ahead of opportunities to experiment with all forms of the new technology—as long as we can assure that no fundamental damage is done to our existing television packages and the home gate. It must be recognized that Baseball's tradition as the national pastime has been considerably enhanced by the game's extensive exposure on network, regional, and local over-the-air telecasts. Today close to 60 percent of all Major League Baseball games are telecast, and this programming obviously constitutes a crucial ingredient in the maintenance of Baseball's economic health.

Thus, we must strike the most careful balance in any experiments with the new technology. The present provisions of Section 111 retain for us control over the telecast of our games. This will permit us to proceed in negotiations with the new technology in a fashion which will preserve the essential over-the-air role in our telecasting. As we point out, to give cable an across-the-board compulsory license to our telecasts would deprive us of the ability to proceed with controlled experimentation. I can assure you that the Commissioner's office will move forward reasonably and responsibly in any negotiations with cable interests.

I. SUMMARY OF BASEBALL'S POSITION

Baseball's basic position on the merits of the copyright issue remains as follows:

A. Unrestricted cable transmission of Baseball games could seriously dilute the value of Baseball's television revenues and devastate home game attendance in both Major League and Minor League cities:

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[1] S. 1361, 93rd Cong., 1st Sess. § 111 (1973). See specifically Section 111(c)(4)(C).

> (1) Baseball's television revenues currently constitute about 25 percent of its total operating revenues. Unrestricted cable transmission will surely have a crippling effect on this vital source of revenue underpinning Baseball's economic health. Unlimited cable carriage will destroy the exclusivity of local Baseball programming which each Club presently offers in major metropolitan areas, thus diluting the value of each Club's local and network broadcast package.
>
> (2) Further, if there is no prohibition of unrestricted carriage of games, cable carriage can have a devastating effect on home gate attendance in Major League cities.
>
> (3) Even if some form of a blackout restriction is adopted, this would leave cable free to import distant signals of competing games any time that a team is on the road despite the fact that most Major League teams telecast only away games back to the home city. These cablecasts would be in direct competition with—and seriously depreciate the value of—the television package that a local club has to offer.

B. Televised Baseball is already widely available to the American public. Indeed, there is no lack of Baseball broadcasts over the air currently. Of the total of almost 2,000 scheduled Major League games during the 1971 season, close to 60 percent were televised. Nationally televised games over the 190 affiliates of the National Broadcasting Co. (NBC) include the NBC Game of the Week, the 15 Monday Night Games also carried nationwide, the two League championships, the All-Star Game, and the World Series.

Beyond the national network, each Club authorizes additional local and regional telecasts of its own games—in 1973 some 1,093 regular league games telecast on 173 different television stations.

Nevertheless, Baseball recognizes that there can be legitimate experimentation of televised Baseball on cable television systems so long as Baseball retains control of bargaining rights over cable carriage of Baseball games to ensure that its over-the-air broadcast package is not compromised.

C. Unrestricted cable carriage could destroy the Minor League system. In 1971, the 17 Minor Leagues (comprised of 127 individual U.S. teams) played more than 7,300 games before some 11 million fans. In many cities across this country, Minor League Baseball is the only live professional sports event available in the local community. Moreover, this extensive Minor League system is essential as a training ground for the Major Leagues—which spend approximately 25 percent of operating revenues ($31 million in 1969) for player development. Unrestricted cable-casting in Minor League communities would decimate home attendance.

New evidence confirms our earlier fears that unrestricted access to sports programming by the rapidly growing cable industry poses for Baseball problems of catastrophic proportions.

In order to secure a further factual foundation to our concerns, I commissioned a survey of each of the hundreds of cable television authorizations issued by the FCC over a year-long period to determine the extent to which the home territories of the various Major League Clubs are open to invasion by the importation of distant broadcast signals transmitting Baseball games.

The results of this survey dramatize Baseball's plight.

The FCC authorized 304 cable systems in territories of Major League Clubs during the first year following the adoption of its new cable rules (from March 31, 1792, to April 1, 1973). At least 171 of these cable systems—or 56 percent—will import signals of a distant TV station which telecasts the games of other Clubs. For instance, cable systems in the heart of the Philadelphia and Boston home territories have already been authorized by the FCC to carry the extensive telecast schedules of the New York Yankees and Mets from stations WPIX-TV and WOR-TV in New York. There is nothing either the Mets or Yankees can do to prevent this.

In the Boston Red Sox's home territory, eleven communities within 35 miles of downtown Boston have received authorizations from the FCC under the new cable television rules to carry the distant signals of the two New York television stations carrying the Yankees and the Mets, WPIX-TV and WOR-TV. In the Philadelphia Phillies' home territory, the New York invasion is also significant. Cable systems in twelve communities within 35 miles of the heart of Philadelphia will carry the Mets, and six cable systems will carry the Yankees.

The Minnesota Twins, thanks to the importation of WGN-TV, Chicago, into suburban Minneapolis-St. Paul, will compete with the cablecasting of 148 Chicago Cubs games on a cable system in Bloomington, Minnesota, home of the Twins' Metropolitan Stadium.

The Pittsburgh Pirates, the Cleveland Indians, the Kansas City Royals, the Cincinnati Reds, and several other Clubs will suffer similar invasions by cable importing distant signals of major independent stations. The most dramatic example of this "super station" syndrome., so far as revealed by our study, is WOR-TV, New York, which will carry regularly the Mets' games to cable television systems as far West as Ohio and as far North as New Hampshire.[2]

II. BACKGROUND OF THE COPYRIGHT REVISION BILL

Before presenting Baseball's position in detail, it is useful to review the history of the Copyright Revision Bill's sports-cable provision which affords professional sports control over the transmission of its games.

You will recall that in 1967 and 1968 the Commissioner of Baseball expressed his grave concern that Baseball would be seriously prejudiced if it did not receive full control in the Copyright Revision Bill of the dissemination of its television broadcasts.

After the most careful consideration, in the spring of 1969 the Subcommittee reported out a copyright revision bill which included provisions comparable to Section 111(c)(4)(C). The Subcommittee's draft concluded "that the transmission of organized professional sporting events requires special consideration."[3] The Subcommittee Report stated further that:[4]

"Unrestricted secondary transmission by CATV of professional sporting events would seriously injure the property rights of professional sporting leagues in televising their live sports broadcasts. Unregulated retransmission of live sports events could also have serious consequences on gate attendance, such as major and minor league baseball games."

Most emphatically, there are no new economic facts which would alter the Subcommittee's initial determination.

On February 3, 1972, the Federal Communications Commission announced it was lifting the freeze on cable television development by promulgating a new regulatory structure effective March 31, 1972. On that same date, February 3, the FCC in a separate rulemaking proceeding proposed a sports-cable rule framed in the narrower terms of the Sports Broadcasting Act of 1961.[5] The rule provided protection from imported distant signals carrying distant sports events only when a team was playing at home—a proposal parallel to the blackout provisions in the 1961 Sports Broadcasting Act. Baseball appeared in FCC proceedings to press for the Commission to adopt regulatory provisions comparable to those in Section 111(c)(4)(C). There are clear indications that the Commission feels that it is restrained in the development of rules by the policies set forth in the Sports Broadcasting Act of 1961 and believes that Congress should resolve the underlying policy issues in the copyright revision bill. Thus, in promulgating its rulemaking on the sports-cable question, the Commission said:[6]

"This is a complex area involving the effect of telecasting on gate receipts of sports teams and their ability to survive or thrive. Consequently, we welcome Congressional guidance."

The Commission, then, shows every disposition to defer to this Subcommittee and the Congress in their consideration to extend to sports complete control over the dissemination of sports telecasts. The FCC has never completed final action on its proposed sports-cable rule, although it promised prompt action at the time broad-scale hearings held before the full Commission in July 1972.[7]

In the meantime, Baseball and other sports are being put in a highly prejudicial position as the FCC continues to approve hundreds of authorizations to cable systems which are planning to use sports as a major factor in selling their service. Indeed, the cable industry's trade association has said that "proposed systems in major markets, already faced with heavy exclusivity for movies and series, have counted on sports as the redeeming factor to develop the planned operation."[8] Of course, these cable authorizations have been granted with the recognition that their rights to carry sports broadcasting can be limited or eliminated by FCC rule or Congressional action.

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[2] In Ohio, WOR-TV and the Mets are on a cable television system in Ashtabula; the system has 6,184 subscribers. In New Hampshire, WOR-TV and the Mets are on a cable system in Nashua; the system has 3,073 subscribers.

[3] Draft Report of the Subcommittee on Patents, Trademarks, and Copyrights, U.S. Senate Committee on the Judiciary, on S. 543 (now S. 1361), Spring, 1969.

[4] *Id.*

[5] *Cable Television and the Carriage of Sports Programs*, Docket No. 19417, 36 F.C.C. 2d 641 (1972).

[6] *Id.*

[7] *Cable Television and the Carriage of Sports Programs*, Docket No. 19417, Oral Argument Before the Federal Communications Commission *en banc*, July 20, 21, 1973.

III. MASSIVE DISRUPTION OF THE SYSTEM

Unrestricted Cable Transmissions Will Cause a Massive Disruption of the Present System of Distribution of Baseball Telecasts.

The plight Baseball faces can be understood only against the background of the distant signal rules which the Commission adopted on February 2, 1972, and made effective the following March 31.[9] Essentially, the rules would permit CATV systems operating in metropolitan communities in which Major League Baseball teams are located to import the signals of two or three distant independent (non-network) stations. The distant signals could be imported from any market in the nation which is not in the top twenty-five markets. However, if the distant signal is to be imported from one of the top twenty-five markets, then the system would have to use signals from stations located in either of the two nearest of the top twenty-five markets. As a practical matter, most of the importation of distant signals which will affect Baseball will come from the top twenty-five markets.[10] This is because the major independent television stations in the largest metropolitan centers happen to be the wealthiest independent television stations in the country with the best and most lucrative movie and sports contracts offering the most popular programming. This development is inherent in the structure of the new cable television rules, a structure which favors a very few, well-established independent television stations like WOR-TV in New York and WGN-TV in Chicago.

The following examples illustrate the point:

Chicago is the nearest of the twenty-five largest metropolitan areas to Milwaukee and would be the logical source of independent station signals to be carried by a Milwaukee CATV operator. The Chicago Cubs' broadcast rights are held by WGN-TV, an independent, which this year is telecasting 148 of the 162 regular-season Cubs' games. A second independent, WSNS-TV, holds broadcast rights to the White Sox games and will telecast 129 games this season. These independent stations are likely candidates to be selected by CATV for distribution in Milwaukee's home territory. Thus, added to the telecasts which the Brewers have authorized, an additional 277 Baseball games could be made available in Milwaukee's home territory, only some of which would be required to be deleted when the Brewers were playing at home under proposed FCC rules.

Chicago and Milwaukee are the nearest of the top twenty-five markets to Minneapolis-St. Paul, home of the Minnesota Twins. Since rights to the Milwaukee Brewers games are held by a network station, a cable system operating in Minneapolis could not obtain those games, but the same service from Chicago could be provided in Minneapolis as in Milwaukee with the same impact on the Twins.[11] Indeed, the cable television system recently authorized and now abuilding in Bloomington, Minnesota (pop. 81,761), site of the Twins' Metropolitan Stadium, has already received FCC authorization to import the distant signal of WGN-TV. This means that any cable subscribers living in the shadow of the Twins' Stadium can have access to 148 televised Chicago Cubs games.

A CATV system operating in San Diego (the fifty-second market) could also bring in two distant independent signals. It would most likely select those from

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[8] NCTA legislative letter, Apr. 11, 1972.

[9] Cable Television Service, Part 76, 47 C.F.R. § 76.5 *et seq.* (1972).

[10] That the problems are critical for Baseball is clear from these additional facts. There are 151 Major and Minor League teams in the United States which play in almost as many different communities. An analysis of Television Factbook's 1972–1973 Services Volume reveals that, in all but a handful of communities which have Professional Baseball teams, there are CATV systems in operation; franchises outstanding for CATV systems; or franchise applications pending and under active consideration.

[11] Chicago is also one of the two top twenty-five markets nearest Kansas City where the Royals play.

San Francisco and Los Angeles, the nearest of the top twenty-five markets which carry Giants, Dodgers and Angels games.[12]

Both the New York Yankees' and the New York Mets' broadcast rights are held by independents. WPIX-TV is telecasting 69 Yankees' games this season, and WOR-TV is telecasting 112 Mets' games. The signals of these stations are plums for cable systems which are eligible to carry them under FCC regulations. Systems operating in the heart of the Philadelphia and Boston home territories have already been authorized to carry these signals—and their consequent impact upon attendance and broadcast rights of the Phillies and Red Sox. Boston is perhaps experiencing the most dramatic invasion from the New York teams. Eleven communities within 35 miles of downtown Boston have received authorizations from the FCC under the new cable television rules to carry the distant signals of the Yankees' and the Mets' flagship stations, WPIX-TV and WOR-TV. This means that these 11 Boston area cable television systems are authorized to carry all 181 televised games of the Yankees and the Mets.

To date there has been no cable development in the City of Boston itself. However, one nearby Boston suburb, Somerville, Massachusetts, from where across the Charles River one can see Fenway Park, has received one of the eleven FCC authorizations, and construction of a cable system is underway. Today the Somerville cable system has only 69 subscribers; but the potential in Somerville, with a population of 88,779, is far greater.

The Montreal Expos are carried on Canadian television stations in both French and English. Presumably, every CATV system in this country could lawfully carry the signal of a foreign language station carrying Expos Baseball.[13]

The foregoing are, of course, illustrative only and do not exhaust the potential for conflicting telecasts of Baseball games from distant markets. As pointed out next, unless Baseball controls the distribution of its product, there is a substantial threat that numerous teams, both Major and Minor Leagues, and ultimately Professional Baseball itself, may well be irreparably injured.

IV. ECONOMIC HARDSHIP FOR BASEBALL

Unrestricted Cable Transmissions Will Seriously Undermine the Ability of Baseball to Obtain Substantial and Essential Revenues From the Sale of Telecasts of Sports Contests.

The critical concern of Baseball with unrestricted cable transmissions is that it will almost certainly undermine the potential sales value of current Baseball telecasts—both on the league and individual team levels. The dangers which this situation poses to the continued health and vitality of Baseball cannot be overstated.

1. *The Widespread Presentation of Baseball Telecasts Under the Present System.* A discussion of the effect of unrestricted cable transmissions must be presented in the context of the current pattern of distributing Baseball contests. The most obvious point is there is no shortage of telecasts of Major League Baseball games. Nationally, at least one game (the NBC Game of the Week) is carried over a national network each week during the season in approximately 190 television markets. In addition, there are 15 Monday night games carried nationwide. These games are selected for maximum audience interest based upon the current state of the various pennant races. And of course the most significant events in Baseball—the World Series, the two League Championship Series, and the All-Star Game—are also carried by NBC throughout the nation.

Beyond this, each major league team determines the extent to which it will authorize local telecasts of its own games, and these telecasts provide additional viewing fare for millions of Americans. Every Major League team has authorized telecasts of some of its schedule. These individual contracts (exclusive of that of the Montreal Expos, whose games are not telecast in any United States market) in 1973 will result in 1,093 regular league games telecasts on 173 different television stations. The tables set forth below reflect the extent of such individually authorized telecasts planned for the 1973 championship season.

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[12] The Los Angeles independents which hold the rights to the Dodgers and Angels games, may in any event, be "significantly viewed" in San Diego and the signals would not be counted against the two distant station allotment.

[13] Section 76.61(e), 47 C.F.R. § 76.61(e) (1972).

SUMMARY OF PLANNED HOME AND AWAY GAMES TELECAST, BY TEAM, 1973

	Number of games telecast	Home games telecast	Away games telecast	Number of stations in teams network
Atlanta Braves	48	0	48	[1] 24
Baltimore Orioles	52	8	44	[1] 4
Boston Red Sox	65	17	48	[1] 8
California Angels	30	0	30	1
Chicago Cubs	148	81	67	[1] 12
Chicago White Sox	129	81	48	[1] 1
Cincinnati Reds	35	5	30	[1] 9
Cleveland Indians	32	0	32	[1] 2
Detroit Tigers	40	0	40	[1] 7
Houston Astros	20	0	20	[1] 24
Kansas City Royals	28	0	28	[1] 8
Los Angeles Dodgers	22	0	22	1
Milwaukee Brewers	30	10	20	[1] 6
Minnesota Twins	30	0	30	[1] 14
New York Mets	112	58	54	[1] 5
New York Yankees	69	37	32	[1] 10
Oakland Athletics	22	0	22	1
Philadelphia Phillies	70	24	46	[1] 4
Pittsburgh Pirates	38	0	38	[1] 6
St. Louis Cardinals	29	0	29	[1] 21
San Diego Padres	0	0	0	0
San Francisco Giants	22	0	22	3
Texas Rangers	22	0	22	2
Total	1,093	321	772	173

[1] Affiliates do not all carry all games.

The decision by each team to authorize a given number of telecasts takes into account a variety of considerations, including the possible impact of telecasts on home attendance. Many teams have elected not to authorize telecasts of their home games because of the impact on gate attendance.[14] In fact, it appears that the trend is to telecast even fewer home games to protect the gate and increase the telecasts of away games.

Moreover, where a "network" station is located in the community of a Minor League team, most teams will not clear their game telecasts into that market when a telecast would conflict with a home game of the Minor League team.

2. *The Importance of Telecasting Revenues to Baseball.* Baseball's established pattern of television would be seriously disrupted by unrestricted cable transmission, with the most serious potential adverse effect upon the existing property rights in live Baseball telecasts.

These rights are extraordinarily valuable to Baseball; indeed, I believe they are indispensable to the continued economic viability of Baseball. The contract for the sale to NBC of rights to the Game of the Week, the Monday Night Game, the All-Star Game, the two League Championship Series, and the World Series for the years 1972 to 1975 will result in payments of over $70 million to Baseball. The keystone of these network contracts is, of course, the degree of sponsor exclusivity which Baseball can now assure NBC.

Moreover, the contracts negotiated by individual teams with local television stations, and in many cases local and regional networks, for exclusive broadcasts of their home and away games (with radio rights) are estimated at an additional $23,000,000 for this year.

It is clear that revenues from the sale of such rights are a principal underpinning of Baseball's structure; any diminution would simply compound the critical economic problems which Baseball now faces at both the Major and Minor League levels.

A substantial number of Major League Clubs operate below or very near the economic-break-even level; decreases in television revenues and home game attendance, which could be caused by unrestrained cable activity, could be fatal. Significantly, broadcast rights at the national and local levels provided more than 25 percent of Major League Baseball's total operating revenues in 1969. Exhibit B shows the dollar value of and contribution to operating revenues of broadcast rights for all Major League teams. These financial data demonstrate that broadcast revenues are absolutely essential to Baseball's survival. The most recent study of Baseball's financial results, prepared by Arthur Anderson & Co., for the year 1969, indicated that 13 of the 24 Major League Clubs suffered losses, some of them very substantial. The aggregate results for all 24 clubs in 1969 showed total losses in the millions. Thus, with these bleak operating results, any diminution of Baseball's broadcasting revenues could threaten the very continued existence of the sport.

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[14] Three-fourths of the telecasts of home games are in two cities—New York and Chicago—where experience has shown that the market is so large, etc., that such telecasts have a minimum impact upon the home gate.

3. *Indiscrimate Cablecasts Could Seriously Impair the Revenues That Baseball Receives From Television.* To give cable systems a compulsory license to telecast distant baseball games would assuredly have an immediate impact upon the price which a broadcaster or sponsor would be willing to pay for the broadcast rights to a given Club's games. To illustrate, the broadcaster pays the Club for the rights to telecast a certain number of the Club's games. The broadcaster can sell the games to sponsors on the basis that these telecasts will be the *primary* source of televised Baseball entertainment in a particular community during the regular season. If, however, a cable system can provide thousands of the city's residents with literally hundreds of other distant Baseball games from distant communities, the broadcaster and the sponsor naturally will pay far less for the rights to the home team's games than would otherwise be the case. This loss of revenue could have the most serious consequences, as outlined above.

Furthermore, the ultimate effect of unlimited cable transmissions could be so severe that independent stations would no longer be considered by Baseball Clubs to be eligible for the purchase of broadcast rights. In order to secure the protection which Baseball needs, all teams may be forced to deal only with network-affiliated stations.[13] However, this decision itself could have serious consequences; independent stations today provide a strong source of competition for television rights. The removal of this competition can have only an adverse effect upon potential revenues.

V. PLIGHT OF THE MINOR LEAGUES

The Proliferation of Cablecasts Could Cause the Death of the Minor Leagues.

Baseball has a special interest—separate and distinct from that of copyright owners generally and other professional team sports—in protecting its Minor League system against unwarranted intrusion from telecasts of Major League teams.

At this time, there are 17 Minor Leagues in the United States comprised of 127 individual United States teams. In 1971, there were more than 7,300 Minor League games played before approximately 11,000,000 fans. Minor League Clubs are the principal source and proving ground for Major League players in addition to being an important source of entertainment for millions of Americans.

No other professional sport operates a player-development system of even remotely comparable magnitude. Indeed, the Minor Leagues exist only because of the direct subsidies provided them by the Major League Clubs and the working agreements which have evolved between Minor League teams and Major League Clubs. In 1969 alone, more than $31 million (or 25 percent of operating revenues) was expended by Major League Baseball on player development, the majority of which went to the major league. Unlike professional football, which utilizes the nation's universities and colleges as its proving grounds for players, Baseball must spend these substantial amounts to ensure to the fans a steady flow of talent.

As noted above, virtually all of the smaller and medium size communities which have Minor League teams have cable systems in operation, franchises outstanding for cable systems, or a franchise application pending under active consideration. Thus, these communities are open for the wholesale importation of sports broadcasts by local cable systems.

There is persuasive evidence that such unregulated expropriation of live Major League games by cable systems could seriously affect Minor League attendance. An inquiry regarding potential cable impact upon Minor League operations produced the following comments:[14]

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[13] Professional Football, which sells all of its rights on a package basis to the national networks, does not, of course, confront the same problem Baseball does. Particularly in the metropolitan market where "adequate service" is already provided, cable systems cannot bring in distant network stations with competing football telecasts.

[14] See Exhibit C for a collection of responses from Minor League teams.

"I definitely feel that CATV would kill practically all of our fans we have left."

"It is my definite opinion that telecasts [by] cable [of] league games into this area would definitely hinder our attendance. I do not have to remind you that attendance in Minor League Baseball parks is a nationwide problem and any further infringement of telecast baseball broadcasts would probably make it impossible for most minor league clubs to continue a successful operation. It is too easy even now to stay at home and watch television than to go out and support your own local activities whether it be baseball, hockey or basketball—and we have all three in Salem."

"Again, in my opinion, CATV in this area would come close to being the death knell of Minor League Baseball in Rochester. We are trying by every promotional means possible to keep AAA baseball in Rochester for the benefit of the entire community and are attempting in every way possible to provide wholesome recreation for families and youth in Rochester. I feel it is about time we had help instead of hindrance."

"If we were to be exposed to this type coverage, there would be no doubt in our minds that it would affect our attendance seriously.

"Obviously, if such telecasts were to reach our city, our attendance would suffer drastically."

A reduction in gate attendance at Minor League games with a corresponding reduction in revenues would pose a dilemma for the Major Leagues which do not have available additional resources to keep the Minor Leagues in operation.

VI. CONCLUSION

In summary, I believe there are sound legal, public policy, and practical reasons why Baseball must maintain control over the dissemination of its games to the viewing public. The Federal Communications Commission's new regulatory scheme for cable television will permit the development of cable in such a way that it could completely undermine Baseball's orderly telecasting patterns and, hence, seriously dilute the value of Baseball's gate receipts and broadcasting rights.

While Baseball is anxious to experiment with the promises of the new cable technology, it is fundamental for Baseball to have complete control of the rights to its games in order to strike an appropriate balance between Baseball's traditional commiment to over-the-air broadcasting and any experimentation with cable television.

EXHIBIT A

See the attached black binder for the complete survey, with a covering memorandum, commissioned by the Commissioner of Baseball to study the effects of the first year of the Federal Communications Commission's new regulatory structure for cable television.

EXHIBIT B

REVENUES TO ALL MAJOR LEAGUE CLUBS FROM TV AND RADIO

Year	Local contracts	National network contracts	Total
1965	$12,497,000	$9,254,000	$21,751,000
Percent of operating revenue	14.2	10.5	24.7
1966	$13,907,000	$9,424,000	$23,331,000
Percent of operating revenue	13.9	9.4	23.3
1967	$13,747,000	$11,807,000	$25,554,000
Percent of operating revenue	13.9	12.0	25.9
1968	$16,375,000	$12,339,000	$28,714,000
Percent of operating revenue	16.3	12.3	28.6
1969	$17,970,000	$15,529,000	$33,499,002
Percent of operating revenue	14.6	12.6	27.0

EXHIBIT C

REPRESENTATIVE COMMENTS OF MINOR LEAGUE BASEBALL TEAMS ON THE IMPACT OF CATV UPON THEIR ATTENDANCE

"I definitely feel that CATV would kill practically all of our fans we have left."

"There is no doubt as to the fact that this WOULD HURT our attendance TREMENDOUSLY, as do ALL telecasts against our HOME games. This is the very thing that can and will put us all out of business, but quick."

"It is my definite opinion that telecasts [by] cable [of] league games into this area would definitely hinder our attendance. I do not have to remind you that attendance in minor league baseball parks is a nationwide problem and any further infringement of telecast baseball broadcasts would probably make it impossible for most minor league clubs to continue a successful operation. It is too easy even now to stay at home and watch television than to go out and support your own local activities whether it be baseball, hockey or basketball—and we have all three in Salem."

"Again, in my opinion, CATV in this area would come close to being the death knell of minor league baseball in Rochester. We are trying by every promotional means possible to keep AAA baseball in Rochester for the benefit of the entire community and are attempting in every way possible to provide wholesome recreation for families and youth in Rochester. I feel it is about time we help instead of hindrance."

"Cable TV does hurt our attendance when we play at home. Most every night of the week you are able to get either the Mets or Yankees games when they play at night. Sometimes you can get both the Yankee and Met games. On holidays it kills our attendance when we play at night."

"During the 1968 season, the telecasts of Major League games via CATV did reach Elmira and, although it is hard to estimate if these games had any effect on our attendance, I'm sure it did. On nights when there was a so-called 'crucial' game on TV and we were playing home, our game attendance was down. This was also true if the weather conditions were less than ideal."

"In reply to your request for CATV information, the telecasts of the games played by the Mets and Yankees all reached our city in the three years we have been members of the NY-Penn League. These are the years 1966, 1967, and 1968.

"While it is most difficult to accurately gauge the effect of the activities without a comprehensive study, I would think they did adversely affect our attendance. One thing is sure . . . they did affect us on the nites which were threatened by inclement weather."

"I did operate the Williamsport Club in 1964 and 1965 and we did have cable TV there. I felt that it did hurt our attendance, since people were less inclined to go out at night and pay to see minor league baseball when they could see one or more major league games at home in the comfort of their living room, at a much lower price, which was next to nothing."

"Should the CATV telecasts of Major League games . . . come to our city I believe we would have to disband baseball. This year the Major League night telecast of baseball cut our attendance about four fifths."

"If we were to be exposed to this type coverage, there would be no doubt in our minds that it would affect our attendance seriously."

"Obviously, if such telecasts were to reach our city, our attendance would suffer drastically."

"I sincerely believe that any telecasts of major league games into our city while we are playing hurts our attendance very much. I do not see how TV games can help the minor league attendance."

STATEMENT OF DON V. RUCK, VICE PRESIDENT, NATIONAL HOCKEY LEAGUE

Mr. Chairman, my name is Don V. Ruck and I am Vice President of the National Hockey League. I am accompanied by counsel, Philip R. Hochberg of Washington, D.C.

We appreciate the opportunity to come before you and testify on your bill, S. 1361, which we fully support. I think there is a consensus that this Subcommittee may be the court of last resort in the copyright area; we welcome the chance to place our case before you.

I would like to second the remarks offered by Commissioner Kuhn. Since hockey and baseball share similar player developmental patterns, we echo his concern for the minor leagues.

The National Hockey League is not the benefactor of ready-made players from the Collegiate ranks. We must develop our own talent. There are, in the United States, five leagues on a minor level. And it is the NHL teams which underwrite the bulk of the cost to operate the minor teams so as to assure the development of young talent.

We, like baseball, are very concerned with the impact that importation of sports signals via cable systems would have on these minor leagues.

More importantly, however, is our concern for the major league of hockey, the National Hockey League. Again, like baseball (and like basketball), the NHL has games scheduled virtually every night of the week. You can well imagine what would be the fate of our new Washington hockey team in 1974 if it faced—on a Washington cable system—the importation of NHL hockey from Philadelphia, New York, and Boston on a nightly basis. The same problem would be faced by our newer teams in Los Angeles, Oakland and Atlanta where hockey has not yet caught on.

And yet the Commission's Rules would afford greater protection to "Pantomine Quiz" and "Bridget Loves Bernie" than they would to professional and amateur sports. Something, I suggest to you, Mr. Chairman, is out of kilter there.

It is indeed ironic that we should be here this week. It was almost exactly two years ago that Chairman Burch, in his Letter of Intent of August 5, 1971, noted that the question of sports programming was a difficult one. He promised expedited consideration of the matter, so that it would be concluded before "the significant emergence of new systems".

And again, a year ago in oral argument on this issue before the Commission, the same fear was voiced. It was stated to the chairman that systems would attempt to sell hookups on the basis of importing distant sports signals.

At one point, he noted that (as of that date) only 13 Certificates had been granted. Today, some 1,100 certificates have been granted and more are being granted daily. Many of the applications and grants are for either the core city contiguous suburban area.

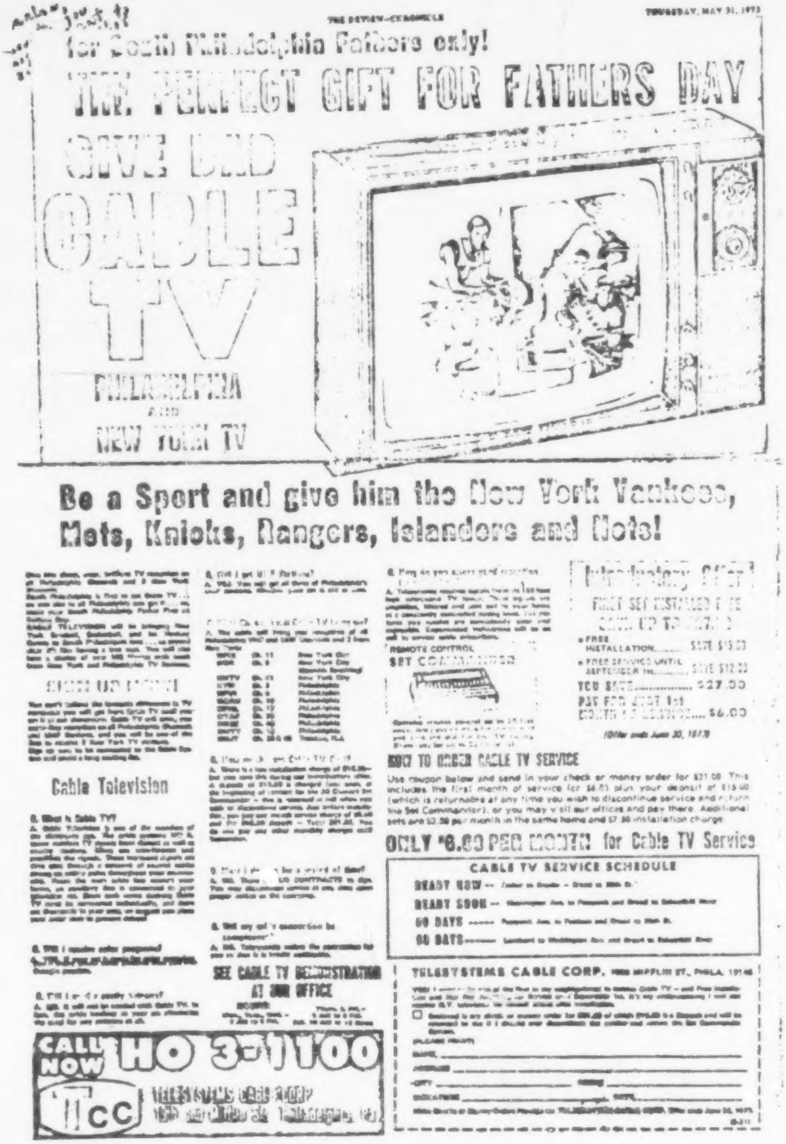
For instance, literally dozens are in the Philadelphia area and four are specifically within the City of Philadelphia itself—including one literally across the street from the Spectrum where these teams play. And this is the very system which has based its appeal for subscribers on distant sports signals! (I am attaching as an Exhibit an advertisement which recently appeared in a Philadelphia newspaper.)

Members of the Commission urged sports to look to Congress as its remedy. Senator Pastore, for one, has indicated his concern with cable systems importing distant sports signals not authorized to the local station. We agree.

It would seem uncommonly logical that the entrepreneurs who have invested millions of dollars to develop the professional sports franchises should quite reasonably, maintain the right to when and where their product will be telecast.

Accordingly, we urge the passage intact of S. 1361.

Thank you.



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OFFICE OF THE COMMISSIONER,
AMERICAN FOOTBALL LEAGUE/NATIONAL FOOTBALL LEAGUE,
New York, N.Y., August 1, 1973.

HON. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MCCLELLAN: In response to your announcement of further hearings on S. 1361, I am pleased to submit my statement on the treatment in that bill of the carriage of sports telecasts on cable television. Copies of my statement on behalf of professional football are enclosed herewith.

Let me express the hope that the way can now be cleared for legislative action on this pressing matter in view of the recent new spurt of cable growth and the inaction of the Federal Communications Commission on the matter. In my opinion it would be unfortunate if enactment of Section 111(c)(4)(C) and other relevant provisions were delayed further while large numbers of American fam-ilies became cable subscribers, and cable owners made substantial capital invest-ments, on the expectation that cable systems would be able to continue pirating NFL game telecasts in derogation of the rights of our member teams.

As in the past, I would be glad to make myself available for further discussion and to supply further information as the Subcommittee may require.

Respectfully,

[Enclosure.]

PETE ROZELLE, *Commissioner.*

STATEMENT OF PETE ROZELLE, COMMISSIONER, NATIONAL FOOTBALL LEAGUE, BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY ON S. 1361

Professional football maintains a strong interest in those portions of S. 1361 which would affect, from the copyright point of view, the carriage of sports tele-casts on cable television. My statement is on behalf of the 26 member clubs of the National Football League who represent many cities and metropolitan areas across the country.

Our interest dates back to the days when cable systems began moving NFL game telecasts around the country without seeking any permission (or offering any compensation), and my statement to this Subcommittee dated August 3, 1966, commenting on S. 1006, expresses that interest. On March 14, and October 31, 1968, I made further statements commenting on S. 597 and H.R. 2512, and we have expressed our views several times since then.

In December 1969, the Subcommittee unanimously reported out a bill, S. 543, which recognized the rights of those who spend considerable sums to stage pro-fessional sports contests for the entertainment of many millions of fans at the ball parks and at their television sets. The Subcommittee (1) expressly gave full statutory copyright protection to live game telecasts and (2) applied that protection to cases where cable systems would import game telecasts into areas where television stations had exclusive rights to receive other games instead or where teams were playing home games. Thus the Subcommittee put cable and broadcast television on an equal footing vis-a-vis the telecasting of NFL and other professional sports contests.

The Federal Communications Commission has not yet acted on its expressed intent to deal with this problem. After the Subcommittee reported S. 543, the Commission announced that it would address itself to various cable television matters, including the carriage of distant stations televising professional games. The Commission has adopted rules that govern general distant-station carriage, and these rules fortuitously resolve many of the NFL's concerns by generally forbidding carriage of distant network-affiliated stations in most television ma:-kets; most professional football telecasts are on these network stations. But these rules contain provisions that would permit cable systems to carry single programs from these distant stations at various times. It is likely that cable owners, who often advertise outside sports programming a a prime attrac-tion to gain new subscribers, will take full advantage of these provisions. The Commission said in July 1970 (Docket No. 18397-A), and again in February 1972 (Docket No. 19417) that it would deal specifically with the unique problem of cable carriage of sports telecasts, and we have on many occasions expressed our views to the Commission in writing and orally. No action, however, has yet been taken. Nor is it entirely clear that the Commission has accepted our position that it has the statutory authority to deal comprehensively with the problem.

Meanwhile matters grow more pressing. After an earlier FCC action slowed much of cable's previously rapid growth, the current rules have once again permitted the industry to expand. In just over one year the Commission has issued over 1,000 certificates authorizing establishment of new cable systems or addition of new distant stations on existing systems; many of these systems are or will be located in the heart of the nation's larger metropolitan areas. Systems are now authorized or operating in substantial segments of the Atlanta, Boston, Buffalo, Cincinnati, Cleveland, Los Angeles, New York, Philadelphia, Pittsburgh, San Diego, San Francisco and St. Louis markets, to name only areas where NFL teams are located, and in many other cities and towns as well. There are something like 3,000 cable systems serving about 7 million homes in 6,000 communities across the nation, and one estimate is that 25 million homes will be connected to the cable by 1975.

Thus, the need for an effective solution increases. And that solution simply is to implement either in the copyright law or in FCC regulations the national policy as it affects televising of professional sports contests. As the Subcommittee's earlier action on S. 543 recognizes, that policy is most forcefully expressed in Public Law 87–331 (the Sports Broadcasting Act of 1961), as amended, 15 U.S.C. §§ 1291–95. There are three principal points:

(1) It has always been the right and the practice of NFL teams not to televise a game in the very area in which it is being played. No television station in that area is authorized to carry that game (except by delayed bradcast), and no cable system should have any greater privilege. (The recent action of the Commerce Committee regarding telecasts of sold-out games, even if enacted into law, will have no bearing on this issue, because our concern in the copyright area is simply to see that cable stands on no different footing from broadcasting.)

(2) The 1961 Act gave sports leagues like the NFL the right to sell television privileges on a package basis and thereby to control the patterns of game telecasts. This has enabled the NFL to require networks to bring every team's away games back to its home city, which as a practical matter has resulted in games being carried on regional networks. And with one of these games also carried nationally under our relatively new "double header" program, we have been able to give most football fans two or three live telecasts of NFL games each Sunday afternoon during the season while also giving each team roughly equal television exposure. (Of course, Monday night games are also televised as are Saturday games late in the season.)

(3) As reflected in Section 3 of the 1961 Act, protecting attendance at college and high school games is an important feature of national policy. We impose restrictions upon the television networks and upon the teams to carry out this policy.

As we have shown many times, unrestricted cable television would undermine, perhaps seriously, these aspects of national policy and would upset the League's television patterns; it would also erode the value of the television rights we sell to the national networks. To prevent these unwanted and unfair results, we reaffirm our support for Section 111(c)(4)(C) of the pending bill, S. 1361, and for the other provisions entitling live sports telecasts to full copyright protection. We also urge vigorous action looking toward final enactment of these provisions into law.

Statement of J. Walter Kennedy, Commissioner of the National Basketball Association, Before the Subcommittee of Patents, Trademarks and Copyrights, Committee of the Judiciary, U.S. Senate on S. 1361

This statement is submitted in connection with the proposed Omnibus Copyright Bill, S. 1361, and specifically to support the retention in its present form of Section 111(c)(4)(C) of that Bill relating to the carriage of sports programs on cable television systems.

The proposed draft of the Copyright Bill contains provisions which would give to sports events the long overdue copyright-type protection which traditionally has been available to other forms of privately produced entertainment. In addition, the Bill would give to sports the vital blackout protection with respect to cable television systems like that which they presently receive with respect to over-the-air television.

Section 111(c)(4)(C) of the proposed Copyright Bill deals with the importation of distant sports signals. It provides that cable systems would be able to carry a sporting event only under circumstances when free television could carry it—that is, with proper authorization from the home team within the particular television market.

The National Basketball Association believes that it is vital that Section 111(c)(4)(C) of the Omnibus Copyright Bill S. 1361 be retained in its present form. Professional sports desperately needs this protection. Without it, cable systems can do without authorization what local stations are properly limited to doing only with permission. Cable should not be able to import distant signals of sporting events unless a local station or cable system is authorized to carry such programs by the appropriate team or league.

The need for the enactment of Section 111 in its present form is illustrated by the nature of the business of professional basketball and by its economic situation.

Professional basketball games are not produced primarily for television viewing and do not have the potential for resale and reuse that a non-sports entertainment program might have. Therefore, importation of distant signals of live basketball games would have harmful results in two important areas: (1) the destructive impact on team attendance at home; and (2) destruction of the team's natural markets for future sales of authorized telecasts and cable transmission.

Sports telecasting is a unique form of entertainment with limited marketability, both in terms of time and regional scope. Therefore, cable importation of distant live sports programs creates problems of a far greater magnitude than such cable distribution of other types of entertainment. Unlike "Lassie" or "Gone With The Wind", very few backetball games (other than the "Game of the Week") have a sufficient national impact to be sold for television on more than regional basis, and none commands the requisite viewer interest to be sold on a repeat basis.

The economics of professional basketball requires that teams and leagues protect and expand existing sources and find new sources of revenues. Costs are such even today that teams cannot exist if they depend solely on the income generated from ticket sales. Television on an authorized, compensated basis has been the answer for sports—but not if cable systems are allowed to destroy these sources of revenues by picking up and distributing programs without compensating either the teams or leagues.

In recent years, a major income factor for the members of the National Basketball Association has been the NBA's ability to sell television rights on a national network basis. Outside this weekly network showing, other existing television rights are sold on a team-by-team basis. The revenues received as a result of this sale of the right to broadcast certain games have kept many NBA teams alive. These revenues are undoubtedly based upon the broadcaster's exclusive right to the game in the relevant territory, his ability to sell commercial time on the broadcast, and the sponsor's willingness to buy the time because he is assured against dilution of the audience by unauthorized cable competition

A recognition of the operation of professional basketball is needed to understand the impact of unauthorized cable transmission of distant signals. In contrast with football, professional basketball games are played somewhere in the United States—and perhaps close to a home city—on almost every day of the week. The home team may average two games a week at home, and unlimited cable distribution of distant signals could make available other games on those two days as well as on each of the remaining five days. Under these circumstances, the home team faces competition from within its own industry as well as competition from other forms of entertainment. In the case of a team which is not currently championship caliber, this increased competition can mean disaster.

Professional basketball's need for the protections contained in Section 111 is illustrated by the dilemma of new and less successful teams like the Cleveland Cavaliers. In order to survive, this team must build a local following, sell admissions and local television rights and establish its place in the community. If, on any evenings when the team is at home or not playing at home, Cleveland audiences had available to them on an unlimited basis games involving, for example, the Milwaukee Bucks, the Los Angeles Lakers and the New York Knickerbockers, the local team would have little chance of surviving. Within a short time, such saturation of local markets would result in a substantial reduction in the number of teams in existence, a loss of player and other employment, the elimination of the opportunity of many persons to see live basketball games, and the disappearance of the other benefits of local involvement which the existence of a home team presently offers. Further down the road could very likely be the shrinkage of the league to a few teams playing against each other principally for television purposes.

The National Basketball Association believes that cable, like over-the-air television, should bargain economically for the right to transmit sporting events and that professional sports should have the right to adequate compensation. The cable industry has often referred to "the public's right to see sports' contests," without any mention of the sports producer's right to be paid for assuming the costs and risks of the business and for his creative efforts in presenting the sports event. We respectfully submit that the public's "right to see" sports contests is no greater than the public's "right to see" "Lassie" or "Gone With The Wind." We point out that no cable operator is so wedded to the public's "right to see" that he would permit anyone to use his cable to exercise that right without paying the cable operator for it.

By adopting Section 111(c)(4)(C) of the proposed Copyright Bill, the Subcommittee has recognized that professional sports is entitled to traditional copyright protection for the sale and broadcast of sports events.

The protection which you have provided in the proposed Copyright Bill is required for professional basketball because of the regional rather than national interest in many of its programs, because of the perishable nature of its product, because of the need to recognize that the professional sports teams and leagues do have proprietary rights to the sports events in which they participate and because of the economic distress in which the industry finds itself.

The National Basketball Association therefore asks that the provisions of the Copyright Bill affecting professional sports be retained in their present form.

Mr. BRENNAN. This concludes the hearings. We will leave the hearing record open until August 10th.

Senator MCCLELLAN. We announced in the beginning of these series of hearings that the interested parties would have until August the 10th——

Mr. BRENNAN. August the 10th.

Senator MCCLELLAN [continuing]. to submit statements for the record. And as we conclude these hearings, the Chair would further announce that if we find some gaps in the testimony in the record we may hold another day of hearings or call on people to further respond to the Committee's request for information.

Thank you very much.

[Whereupon, at 4:10, the committee adjourned.]

APPENDIX

STATEMENT OF COPYRIGHT COMMITTEE, AMERICAN ASSOCIATION OF LAW LIBRARIES, SUBMITTED BY JULIUS J. MARKE, CHAIRMAN

Mr. Chairman and Members of the Subcommittee: I am Julius J. Marke, Law Librarian and Professor of Law, New York University. I am also past president and chairman of the Copyright Committee of the AALL, and submit this statement on behalf of the American Association of Law Libraries. The American Association of Law Libraries was established in 1906 for educational scientific purposes. It is conducted as a non-profit corporation to promote librarianship, to develop and increase the usefulness of law libraries, to cultivate the science of law librarianship and to foster a spirit of cooperation among the members of the profession.

Its headquarters is situated at 53 West Jackson Boulevard, Chicago, Illinois 60604, and it has approximately 1600 members located in every state of the union, Canada and Puerto Rico. All major legal publishers in the U.S. are associate members of the AALL. The AALL also has twelve Regional chapters known as Association of Law Libraries of Upstate New York, Chicago Association of Law Libraries, Greater Philadelphia Law Library Association, Law Libraries of New

England, Law Librarian's Society of Washington, D.C., Law Library Association of Greater New York, Minnesota Chapter of AALL, Ohio Regional Association of Law Libraries, Southeastern Chapter AALL, Southern C[illegible]fornia Association of Law Libraries, Southwestern Chapter of AALL and Western Pacific Chapter of AALL. The Association is also a publisher of established scholarly legal reference works such as the *Law Library Journal*, The *Index to Foreign Legal Periodicals*, *Current Publication in Legal and Related Fields*, the *AALL Publications Series* and cooperates with the H. W. Wilson Company in the publication of the *Index to Legal Periodicals*. Its members work in Law School Libraries, Bar Association Libraries, County Law Libraries, and in Private Practitioners' Libraries. A significant number of them are authors and are very much concerned about the effect of the new technology on copyright law and scholarly legal research, especially as presently reflected in S. 1361.

Our purpose in submitting this statement is to stress our concern that materials duly acquired either by purchase or gift by law libraries and requested for scholarly legal research be promptly available in useable form and without burdensome administrative details by library users or other libraries on interlibrary loan.

We are very much aware of the plethora of statements and arguments over the various proposed copyright revision bills submitted to this Committee over the years both by owners and consumers of copyrighted publications. It is not our purpose to repeat them here. Rather, we would like to call to your attention some of the pressing problems, especially in the realm of public policy, your Committee must resolve, in arriving at a viable, revised copyright law.

(1) We recognize that commercial publishers have a valid interest in securing and maintaining a market for their copyrighted works. This interest, however, must be balanced with the interest of society in the support and implementation of scholarly legal research.

(2) We believe the nub of the problem lies in the interpretation and application of the *Fair Use Doctrine* as set forth in sections 107 and 108 of S. 1361, especially in light of the Report of the Commissioner in the *Williams and Wilkins v. The U.S.* in the U.S. Court of Claims filed February 16, 1972.

(3) In this context we support and approve the statement of the Copyright Committee, Association of American law schools (including American Association of University Professors and the American Council on Education) on S. 1361 submitted to your Committee on July 31, 1973.

(4) In this context, we also submit that there is an urgent need to give librarians an opportunity to spell out in specific detail, as part of the legislative history of sections 107 and 108, factors of library use of library materials not presently illustrated in section 107 nor in any of the studies of the Register of Copyright hitherto filed with Congressional Committees so that librarians could be properly guided in their conduct in such matters. As presently worded, the fear of copyright infringement, because of the lack of specificity of the guidelines established, is precluding and will preclude librarians from legally using copyrighted publications and even those in the public domain, when in actuality, they could be protected by the applicability of the fair use doctrine. Librarians should be given the opportunity to present to this committee, and have considered by this Committee, within the context of fair use, a catalogue of library replication practices that would be tolerated under the proposed revision. For example, should the felt need for on-demand copies be considered as a fair use practice, when the publication to be replicated is out of print or subject to long delays when requested of a publisher.

(5) We believe that publishers and owners of copyrighted publications are failing to assume the responsibilities incumbent upon them in this replication controversy and placing the burden solely on the librarian, who in actually is merely the middleman between the public and the publisher. We strongly urge that this Committee reconsider the role publishers should play in this context and provide that publishers step forward to assume the prime role of controlling the replication of their own materials in libraries. By this we mean that publishers should go into the business of replicating their own materials in libraries, providing the hardware, and collecting the income directly, rather than depending on the librarian to act as their agent, without compensation.

(6) In any event, we submit that librarians should not be required to identify and account for photocopying in their libraries on behalf of their library users. To allow this practice will add considerably to the cost of running libraries at a time of diminishing library budgets and accelerating library costs. It must eventually also affect library service detrimentally and at the expense of scholarly research.

(7) In conclusion, we urge immediate enactment of Title II of S. 1361 (creation of a National Commission on New Technological Uses of Copyrighted Works) without waiting for passage of S. 1361 in its totality, so that possible solutions could be determined with reference to copyright as it will be affected by TV, radio, CATV, computers and similar developments relating to replication.

AMERICAN CHEMICAL SOCIETY,
Washington, D.C., August 6, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights, Senate Office Building, Washington, D.C.

DEAR SIR: I was gratified indeed with the privilege of offering the views of the American Chemical Society on Senate Bill 1361 and the matter of library photocopying, as well as other exemptions, which might allow photocopying of scholarly journals. I thank you and the committee for the respectful attention given my remarks.

On May 3, 1973, Dr. Alan C. Nixon, President, American Chemical Society, addressed a letter to you expressing ACS views on the above subject. It is my understanding that this letter may not be a part of the record on which current considerations will be based. As certain parts of that letter present material on ACS programs which I believe pertinent to the current deliberations, I offer for the record four paragraphs which I believe are useful in development of a full understanding of the ACS position:

"The Society conducts research experimentation on the use of computers and allied electronic devices for the handling and dissemination of scientific information. Based on our own experience and observations of the work of others doing research in this area, we see that such developments are leading us toward systems where a single original work will be used to disseminate multiple copies as well as a variety of subcollections of information derived from the original work. In effect, we are in the process of enhancing the distribution of an author's works by replacing the printing plate with the capability of electronic processing. We urge that the proposed bill be aware of the impact of such developments on the role of copyright protection and follow a course which will in no way prove confining in terms of future technological progress.

The American Chemical Society is actively engaged in a continuing program of development and study relative to convenient access by users, including photo- controversy and placing the burden solely on the librarian, who in actuality which are compatible with the best interests of both copyright producers and users. We are vigorously pursuing a long-standing program to provide interested persons with copies of materials copyrighted by the Society, quickly and at the lowest possible cost, and to license others to reproduce such materials. We are doing all this because we clearly understand the need of chemists for quick and ready access to our published chemical information, and we also desire to adapt to their service the advantage of new communications technology.

Despite these efforts, it is an accepted fact that unauthorized photocopying of complete articles and other copyrighted materials is as widely practiced among scientists as in other lines of endeavor. Although we have no figures to indicate precisely the volume of such copying, in terms of subscription losses, it does appear that the amount of photocopying of chemical publications is considerably higher than in other fields of science. In a study of the copying of technical journals from the New York Public Library, five American Chemical Society journals appeared on the list of 22 most copied journals, and ranked 2, 3, 5, 12, and 13, respectively. Bonn, George S., "Science Technology Periodicals," *Library Journal*, 88(5), 954–8, March 1, 1963. Later studies have shown similar results.

The American Chemical Society will continue to explore these problems in an effort to find solutions on a private level. In addition, we continue willing to participate with others in studies concerning this general problem. We are demonstrating this actively (1) we were a convenor in 1970 of the first Parliament on New Technological Uses of Copyrighted Works, and are continuing our support of ongoing efforts; (2) we initiated and are participating in a multi-sponsored 1972–73 study of the impact of pending copyright-revision legislation on scientific communications; and (3) in 1972 and 1973, we have been participating with associations of private and nonprofit publishers and library associations in efforts to arrive at suggestions for legislative accommodation in the area of photocopying of scientific and technical periodicals. While these and other efforts are being made by private and public interests, we urge that this Subcommittee carefully scrutinize any proposals that it may receive relative to the imposition of further limitations upon the rights and abilities of copyrights proprietors to disseminate information."

Respectfully submitted,

ROBERT W. CAIRNS.

AMERICAN CHEMICAL SOCIETY,
Washington, D.C., August 9, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights, Senate Office Building, Washington, D.C.

DEAR SIR: As you have expressed a desire to have the views of societies, such as the American Chemical Society, on the proposed general education exemption from copyright, as presented by the *ad hoc* Committee on Copyright Law Revision in the testimony of its representative, Harold E. Wigren, before the Subcommittee on Patents, Trademarks, and Copyrights on July 31, 1973, I offer, for the record, some views on behalf of the American Chemical Society. These views are in keeping with and related to the basic principles from which we presented our testimony on July 31, 1973 on the matter of library photocopying.

As I testified, as Executive Director of the American Chemical Society, on library photocopying, I shall not repeat information on the background, magnitude and standing of the American Chemical Society, except to say that the Society produced more than 41,000 pages of scholarly journals and related publications in 1972 and in its CHEMICAL ABSTRACTS it abstracts and/or indexes documents in excess of 410,000 per year. Te budget for the Society for the year 1973 exceeds $36,000,000 of which more than $29,000,000 is devoted to its publications program.

Most of this program is devoted to the refined and accurate record of new contributions to that body of knowledge which we call science. The record of the past 300 years has taught the scientific world the inestimable value of maintaining such a record in an organized fashion. It is from this record that scientists in the universities, as well as in laboratories elsewhere, draw the facts, data, and hypotheses, prepared by their predecessors and contemporaries, which they organize into the base for their pursuit of further advancement of knowledge. It is from this record that the writers of textbooks that present to the student an up-to-date pattern of our state of knowledge draw the documented information from which they build the tools for teaching the rising generation. It is from this record that the teachers develop their own personal storage of knowledge which serves as the basis for their teaching. It is this record that makes it possible for us to know what is known about the working of the physical world. Without it we would need constantly to relearn what others have learned before us—the antithesis of education.

That record has been built and continues to be built with the usually unpaid contributed efforts of the scientists who realize its vital importance and are willing to give their time and energies to protect it and to build it further. Scientific societies, such as the American Chemical Society, perform primarily for the purpose of collecting, critically evaluating, and organizing this new knowledge, then putting it into print in the scholarly journal. That process of publication is possibly increasingly costly. It has been and should continue to be paid for predominantely by the subscribers to these scholarly journals. The scientific and educational publishing societies, operating as not-for-profit institutions, maintain the subscription prices as levels designed to make it possible for the individual scientists, as well as libraries, to subscribe to these journals so as to make the information readily available. In this method of operation the publishing societies operate very close to the break-even point and from time to time have deficits for a year's operation. Such has occurred within the American Chemical Society in recent years. The proposed limitation or exemption for educational use declares that "non-profit use of a portion of a copyrighted work for non-commercial teaching, scholarship, or research, is not an infringement of copyright."

This statement emphasizes the non-profit and non-commercial as though the matter of profit is the only concern. Such is not the case, as a great many of the scholarly journals are produced and published by not-for-profit organizations, often at a loss. They depend on payment by the user, the subscriber, to help them support the basic costs that make possible the publication of these scholarly works used extensively and fundamentally in the educational institution and its processes. If unrestricted or uncontrolled copying without payment is allowed, the inevitable result will be a continuing loss of paid subscriptions to the point of destruction of the system of producing and publishing scholarly journals. The secondary result will be a loss of organized source material to the educational system. What is now proposed to be copied without charge will no longer be available for copying. In closing, I repeat our basic position:

It is desirable that use be made of modern technology in developing optimum dissemination. This technology includes the use of modern reprography, but as technology inherently includes economics, the means of financial support of the system must be a part of its design. Therefore, photocopying should not be allowed under any circumstances unless an adequate means of control and payment is simultaneously developed to compensate publishers for their basic editorial and composition costs. Otherwise, "fair use" or library-photocopying loophole, or any other exemptions from the copyright control for either profit or non-profit use, will ultimately destroy the viability of scientific and technical publications or other elements of information dissemination systems.

Respectfully submitted.

Robert W. Cairns.

American Guild of Authors & Composers,
New York, N.Y., August 1, 1973.

Hon. John L. McClellan,
Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, Washington, D.C.

Dear Senator McClellan: I am the President of the American Guild of Authors and Composers (AGAC).

Together with other members of the music industry, we have sought to have enacted a revision of the existing copyright act which would expand the benefits of copyright protection to our three thousand members. It is for this reason that we wish to record our opposition to Section 112(e) of S. 1361 and to associate ourselves with the remarks of Mr. Albert F. Ciancimino. Representing authors and composers of literally every type of musical work, we find no justification for the proposed amendment. At the very least, it would reduce the already nominal income received by those of our members who write "religious" music (assuming such term is capable of meaningful definition).

In this connection, I should like to bring to the Committee's attention the fact that I am one of the composers of "I Believe"—a most valuable copyright—which has been performed in many houses of religious worship and which clearly was not written as a religious work, i.e. one intended to be performed primarily in a house of worship. (Over the years some other published "religious" musical works of mine have included "One God", "My Friend", "I'm Grateful", "The Gentle Carpenter of Bethlehem", "Our Lady of Guadalupe", "Your Prayers are Always Answered", "You go to Your Church and I'll go to Mine", and others.)

I am pleased to have been given this opportunity to express the views of our Guild.

Very truly yours,

Ervin Drake, *President.*

American Institute of Physics,
New York, N.Y., August 7, 1973.

Hon. John L. McClellan,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Senator McClellan: Pursuant to the gracious invitation extended by the Subcommittee for interested organizations to submit statements in connection with the Subcommittee's consideration of S. 1361, the Copyright Revision Bill, we are pleased to add our views to those of the American Chemical Society and of others who have testified before your Committee to urge that, in the new legislation, it is made clear that those who hold copyrights on scientific and educational publications can require those who photocopy them to contribute to the cost of publication, lest the flow of scientific information be cut off at its source.

The American Institute of Physics Incorporated is a non-profit charitable and educational organization. The Institute's charter purposes are "the advancement and diffusion of the knowledge of physics and its application to human welfare."

It has eight Member Societies, which are likewise non-profit charitable and educational organizations interested in the promotion of physics and related sciences:

The American Physical Society, Optical Society of America, Acoustical Society of America, Society of Rheology, American Association of Physics Teachers, American Crystallographic Association, American Astronomical Society, and American Association of Physicists in Medicine.

Persons who belong to its Member Societies also enjoy membership in the Institute of Physics. The individual membership consists of approximately 50,000 persons.

The Institute is engaged primarily in the publication of scientific journals devoted to physics and related sciences and in providing a growing number of secondary information services, principally based on the material in its journals.

Its journals include:

The Physical Review, published on behalf of The American Physical Society—circulation 33,057.

Physical Review Letters, published by The American Physical Society—circulation 10,341.

Reviews of Modern Physics, published on behalf of The American Physical Society—circulation 10,556

Bulletin of the American Physical Society, published on behalf of The American Physical Society—circulation 29,102.

Physical Review Abstracts, published by The American Physical Society—circulation 27,721.

Journal of the Optical Society of America, published on behalf of The Optical Society of America—circulation 9,310.

Applied Optics, published by The Optical Society of America—circulation 9,278.

Optics and Spectroscopy, published on behalf of The Optical Society of America—circulation 1,865.

Soviet Journal of Optical Technology, published on behalf of The Optical Society of America—circulation 615.

The Journal of the Acoustical Society of America, published on behalf of the Acoustical Society of America—circulation 7,728.

Program of the Acoustical Society of America, published on behalf of the Acoustical Society of America—circulation 4,672.

American Journal of Physics, published on behalf of the American Association of Physics Teachers—circulation 13,614.

The Physics Teacher, published on behalf of the American Association of Physics Teachers—circulation 10,082.

The Astronomical Journal, published on behalf of the American Astronomical Society—circulation 2,297.

Bulletin of the American Astronomical Society, published on behalf of the American Astronomical Society—circulation 1,599.

The Journal of Vacuum Science and Technology, published on behalf of the American Vacuum Society—circulation 3,912.

AAPM Quarterly Bulletin, published on behalf of the American Association of Physicists in Medicine—circulation 814.

Applied Physics Letters, published by the American Institute of Physics—circulation 4,209.

Journal of Applied Physics, published by the American Institute of Physics—circulation 7,498.

Journal of Chemical Physics, published by the American Institute of Physics—circulation 5,945.

Journal of Mathematical Physics, published by the American Institute of Physics—circulation 2,919.

The Physics of Fluids, published by the American Institute of Physics—circulation 3,597.

The Review of Scientific Instruments, published by the American Institute of Physics—circulation 8,118.

Physics Today, published by the American Institute of Physics—circulation 61,725.

Soviet Astronomy AJ, published by the American Institute of Physics—circulation 635.

Soviet Journal of Nuclear Physics, published by the American Institute of Physics—circulation 715.

Soviet Physics–Acoustics, published by the American Institute of Physics—circulation 789.

Soviet Physics–Crystallography, published by the American Institute of Physics—circulation 794.

Soviet Physics–Doklady, published by the American Institute of Physics—circulation 1,000.

Soviet Physics—JETP, published by the American Institute of Physics—circulation 1,480.

JETP Letters, published by the American Institute of Physics—circulation 1,198.

Soviet Physics–Semiconductors, published by the American Institute of Physics—circulation 668.

Soviet Physics–Solid State, published by the American Institute of Physics—circulation 1,195.

Soviet Physics–Technical Physics, published by the American Institute of Physics—circulation 950.

Soviet Physics–USPEKHI, published by the American Institute of Physics—circulation 1,088.

In addition, it produces and markets the following secondary services:

Current Physics Advance Abstracts:
- (a) Solid State;
- (b) Nuclei and Particles; and
- (c) Atoms and Waves.

Current Physics Titles:
- (a) Solid State;
- (b) Nuclei and Particles; and
- (c) Atoms and Waves.

Searchable Physics Information Notices, a computer readable magnetic tape called SPIN.

The individual Institute members are the authors of most of the papers published in its learned journals, having performed the research in the science of physics and related sciences which are therein reported. The journals of the Member Societies and those sponsored directly by the Institute are the primary and archival methods of recording and dispersing this information, supported and assisted by the secondary services above mentioned made necessary and possible by modern technical invention.

The 50,000 individual Institute members are, of course, the principal individual readers of its journals and the principal ultimate users of its secondary services in their pursuit of advances in the science. The Institute of Physics by reason of the nature of its membership, the publishing functions it performs and its dedication to serve the public interest alone, may well have a broader viewpoint on the question of library photocopying of copyrighted material than the persons or organizations whose interests are more limited.

We have had the benefit of reading the July 31, 1973 statement prepared for your Committee by Dr. Robert W. Cairns as Executive Director of the American Chemical Society. We believe that it fairly presents the position of the American Institute of Physics Incorporated in this Important matter. We urge that Dr. Cairns' statement receive your most careful consideration in framing the Copyright Revision Bill.

Respectfully yours,

AMERICAN INSTITUTE OF PHYSICS INCORPORATED,
H. RICHARD CRANE, *Chairman*.

STATEMENT TO SUPPLEMENT TESTIMONY ON S. 1361 SUBMITTED BY EDMON LOW ON BEHALF OF AMERICAN LIBARAY ASSOCIATION

Some testimony presented at the above Hearing urged that some royalty payment for photocopying be instituted and stated that a mechanism is now available to easily permit such an arrangement. The following points are submitted for consideration in this connection:

(1) Such an arrangement completely destroys the fair use concept which is the right to copy in limited amounts for stated purposes *without* permission.

(2) If payment is required for *all* photocopying, the scholar or library then must secure license for such from each copyright proprietor which then would require that the Copyright Act provide for mandatory licensing.

(3) Even with mandatory licensing, there is no assurance that works will not be suppressed by establishment of royalty rates which are prohibitive. Therefore, the Copyright Act must establish a fixed royalty rate applicable to all copying.

(4) The mechanism envisioned apparently involves sense marks on copyrighted works which could be recognized and recorded by a Xerox machine, properly equipped, as to copyright proprietor, journal or monograph, and royalty rate and amount. This raises the following questions:

(*a*) What would be done about the vast amount of material now protected by copyright but without sense marks?

(*b*) What Xerox machines would be required to be fitted with sensing equipment? Only those in the library? Or all those in a school or college? Or all machines everywhere?

(*c*) How would royalty rates be charged and who would regulate charges? Such regulations would be necessary since copyright is a monopoly.

(*d*) Would different rates be permitted for different works?

(*e*) Would royalties be payable in a lump sum to some agency, or would they have to be segregated by copyright proprietor, journal, article, or monograph?

(*f*) How often would payment be made?

Of the above points, the first is by far the most fundamental, and important. Abandoning fair use is a sacrifice which the public should not be required to make. The other points indicate that, even if this concession were made, there is no practical way at present for libraries to implement such a concept. This is the chief reason why no compromise has been possible—copyright proprietors want fair use eliminated, libraries are unwilling to give up the concept, and no workable procedure has been proposed in its stead.

AMERICAN MEDICAL ASSOCIATION,
Chicago, Ill., August 7, 1973.

Hon. JOHN H. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: S. 1361, now before your Committee, in proposing a general revision of the copyright laws imposes in section 108 a special restriction that libraries shall not photocopy any published book unless there is assurance that copies are not available from commercial sources. Such a provision, we believe, would seriously hamper the dissemination of scientific information through reference libraries, and would be particularly unfortunate for members of the scientific community and physicians in their concern for health care delivery.

The AMA joins with national library groups and professional societies in opposition to the restriction proposed in section 108. We urge legislative action which will acknowledge the right of the scientific and scholarly community to gain access to the educational resources of this country, and assure that libraries may disseminate single photocopies of scientific publications.

Our area of concern is the right to reproduce single copies from scientific publications. The overriding need to preserve this right is expressed in a June, 1972, editorial in the Journal of the American Medical Association (JAMA), entitled "Photocopying and Communication in the Health Sciences." A copy of the editorial is enclosed. We respectfully submit it for your examination, and request that this letter and the editorial be incorporated in the record of the hearings on S. 1361.

Sincerely,

ERNEST B. HOWARD, M.D.

[Journal of the American Medical Association, June 5, 1972]

EDITORIAL

PHOTOCOPYING AND COMMUNICATION IN THE HEALTH SCIENCES

A long-standing objective of libraries is to make intellectual resources available to the scientific and scholarly communities. In recent years this objective has been complicated by the tremendous increase in number of publications so that it is no longer possible for most libraries to include all important and relevant publications in a single collection. There are an estimated 6,000 medical journals published each year and 206,000 articles were included in the 1971 edition of *Index Medicus.*

One solution to this problem is the sharing of resources through interlibrary cooperation. Through the impetus of the National Library of Medicine, this concept became highly developed, resulting in the formation of a Regional Medical Library network across the country, in which libraries of excellence were designated as resources in 11 regions to assist those with lesser resources, such as the small community hospital libraries.

In this system, the distribution of library materials over distances was primarily accomplished through photoduplication. This process decreased the necessity of loaning original volumes, as selections from publications may be duplicated and transmitted through mail, or by telefacsimile or other processes. This method was highly successful and enabled scientists, practitioners and scholars to have ready access to great repositories of information. In the case of the physician in practice, especially in remote areas, it was a means of obtaining specific information required in patient care or for keeping up with areas of interest.

A recent court decision, however, is threatening to reverse this progress. Four years ago in a test case, the Williams and Wilkins Company, Baltimore, publishers of more than 30 scientific and medical journals, sued the National Library of Medicine, National Institutes of Health, alleging that their photocopying activities constitute an infringement of copyright. In February 1972, the Commissioner of the United States Court of Claims ruled that Williams and Wilkins clearly had grounds for complaint, that photocopying diminishes its potential market, and that the company is entitled to compensation.

The consequences of this action to libraries and the scientific community cannot yet be fully perceived. Suggested methods of compensation, such as a five-cent-per-page charge or increases in subscription, entail unwieldly accounting systems or a prohibitive increase in cost at a time when libraries are already burdened with budgetary problems. Officials at the National Library of Medicine have estimated that the cost to medical libraries may run into millions of dollars a year. This, in turn, may force many medical libraries to limit services or increase access time, with serious consequences to those concerned with health care—the researcher, the teacher, and the practitioner. A broader issue is the implications of this decision on the conversion of printed matter to microfilm, tape storage, and other media.

The Commissioner's ruling will be appealed to the full panel of seven judges on the U.S. Court of Claims, and, in likelihood, to the Supreme Court. In the meantime, the American Library Association, Association of American Medical Colleges, Medical Library Association, and other professional societies have joined forces to urge the Court to reject the Commissioner's conclusion of law.

The American Medical Association joins these groups in reaffirming its belief in the right of the scientific and scholarly communities to gain access to the intellectual resources of this country. Toward this end, the Association reiterates its position that the scientific community may continue to reproduce single copies from AMA scientific publications.

KTHV,
August 28, 1973.

Hon. JOHN L. MCCLELLAN,
Little Rock, Ark.

DEAR SENATOR MCCLELLAN: Pursuant to our discussion in your office last week, I have prepared the attached statement on behalf of the Arkansas Broadcasters Association regarding Section 111 of Senate Bill 1361. I have done this not with a lot of legal mumbo jumbo, but rather in simple terms as I understand the situation.

Most of the attached information is already into the record of your committee, having been testified to by a representative of the National Association of Broadcasters. Our position is in agreement with the NAB.

Thank you, Senator, very much for the very informative meeting that we had with you in your office, and certainly we hope to have more of this type dialog in the future.

Thank you for allowing us to submit this addendum paper for the record.

Very cordially yours,

B. G. ROBERTSON.

STATEMENT OF B. G. ROBERTSON

My name is B. G. Robertson. I am Vice President and General Manager of television station KTHV, Little Rock, Arkansas. This statement concerning the CATV copyright provisions of Section 111 of S. 1361 has been endorsed by the Arkansas Broadcasters Association.

Cable television is no stranger to Arkansas. CATV systems have been in operation there since the early 1950's and have played an important role in bringing television service to many in remote areas who otherwise would be without television altogether, or at least, with very limited service. But CATV did not come among us without raising problems. The principal questions it presented were (1) how many, if any, distant television signals should a system be allowed to bring into the market area of a local television station and (2) should CATV systems pay copyright fees for the use of the programs they retransmit. These questions were kicked around for years without any semblance of agreement on a resolution by the people concerned—the broadcasters, the cable operators and the copyright owners. Finally, in the latter part of 1971 the White House's Office of Telecommunications Policy presented the concerned parties with a compromise agreement and strongly urged each of them to adopt its provisions.

We broadcasters were not happy with the terms of the compromise. It permitted CATV to import more distant signals into our markets than we believed we could live with in terms of the effect those signals could have on our audiences and revenues. On the other hand, however, the agreement did offer an acceptable solution to the old nagging question of why CATV systems should not pay copyright fees just like we do. With a very short time allowed to decide whether we would support the agreement and faced with the stark reality that this might be the last chance to achieve a resolution of those old gnawing questions, we in Arkansas reluctantly advised our national trade association representatives to adopt the compromise. Broadcasters around the country apparently shared our views and our national representatives agreed to the compromise.

The FCC was delighted by this long sought agreement on the distant signal and copyright questions. They immediately went to work on implementing the regulatory provisions of the compromise and in a couple of months had issued rules reflecting what the parties had agreed upon as to distant signals. In other words, the cable operators got all they had bargained for by adopting the compromise. Copyright legislation—the other half of the deal—remained to be implemented.

The principal copyright provisions of the compromise agreement are as clear as the nose on your face:

1. All parties agree to support separate CATV copyright legislation as described in the agreement.

2. Compulsory licenses would be granted to CATV operators to cover all signals authorized under the FCC's February 1972 rules. There would be no compulsory license granted for distant signals authorized by the FCC subsequent to the February 1972 rules.

3. Unless the copyright owners and CATV owners could agree on a schedule of fees in time for inclusion in the new copyright law, the law would simply provide for compulsory arbitration of the fee question.

Broadcasters have lived up to all aspects of the compromise and expect the other parties to do likewise. Yet it appears that the CATV people are not supporting copyright legislation as described in the agreement. They appear to be turning their backs on the agreement now that they have received the distant signals provided for in the agreement. This distresses us greatly.

Obviously, Congress is not bound by an agreement entered into by private parties. But for years Congress implored the concerned parties to settle their differences. Indeed, the distinguished Chairman of this Subcommittee informed the FCC Chairman in January 1972 that the agreement was in the public interest and reflects a reasonable compromise of the positions of the various parties. We would hope, therefore, that Congress would respect the compromise agreement and incorporate its copyright provisions into the new copyright law.

We agreed to the compromise with our eyes open. Though under considerable pressure, we nevertheless knew what we were agreeing to and were prepared to live up to each of those agreements. We have not waivered, and will not. Unfortunately, the cable people seem determined to conjure up excuses for not supporting the copyright aspects of the agreement. Only Congress can set things right. We strongly urge incorporation of the copyright terms of the compromise agreement in S. 1361.

Thank you for permitting us to submit this statement.

Statement of Association for Educational Communications & Technology,

Howard B. Hitchens, Executive Director, July 31, 1973

The Association for Educational Communications and Technology (AECT) represents eight thousand educators whose aim it is to improve the educational environment available to learners at all levels through the application of technology to instruction. Our members have a wide range of responsibilities including the study, planning, application and production of communications media for instruction. They are employed in schools and colleges; in the Armed Forces and industry; and in museums, libraries and hospitals. It is important to note that our members interpret educational technology as more than machines and equipment. Rather, it is a process, rooted in learning theory and communications research, that enables a learner to learn more effectively and efficiently. This basic assumption necessarily influences our position on the general revision of the Copyright Law (title 17 of the United States Code) and specifically on the issue of a general educational exemption.

Several bills have been introduced during the past ten years proposing revision of the 1909 Copyright Act. These bills have stimulated much activity within the educational community, as there are several aspects of copyright law revision that potentially have a great impact upon education—duration of copyright, the doctrine of fair use, and, the topic of the current hearings, a general educational exemption.

It is important to note that the whole issue of copyright law revision has caused two parts of the educational community that generally share similar objectives and concerns, and that usually maintain a symbiotic relationship, to appear as adversaries. These are the educators and the producers of educational materials. As one copyright attorney has said, "The fundamental issue is clear: [Educators] are primarily interested in availability [of materials] for use; authors and publishers are primarily interested in payment for use."[1]

There is little doubt that the success of each group depends upon the support of the other. If educators do not utilize instructional materials, the producers surely cannot remain in business. The teacher, media professional and librarian create markets for an author's works and give them visibility. Likewise, in this day of individualized instruction, the open classroom, ungraded schools, and student self-evaluation, the successful educator—teachers, librarians, curriculum developers—wants to utilize a wide range of learning resources. Certainly, when producers and users can act in concert, the student reaps the benefits. It is indeed unfortunate then, that a "we-they" atmosphere has developed where educational organizations and commercial producers "agree to disagree" on copyright issues.

The United States Constitution gives to Congress the power to grant copyrights. The concept of copyright was first developed with an eye toward protecting the public interest. "To promote the progress of science and the useful arts." Congress was empowered to grant to authors certain controls over their work—in other words, a copyright. As stated in studies prepared for the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights:

> As a condition of obtaining the statutory grant, the author is deemed to consent to certain reasonable uses of his copyrighted work to promote the ends of public welfare for which he was granted copyright.[2]

Congress is thus faced with maintaining a balance between providing for the compensation of the author and making information available to the public.

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[1] Eugene Aleinikoff, *Copyright Considerations in Educational Broadcasting*, (Stanford, California: ERIC Clearinghouse on Media and Technology), 1972, p. 1.

[2] *Copyright Law Revision*, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, Senate Committee on the Judiciary, 86th Congress, 2d Sess., Committee Print, Study 14, "Fair Use of Copyrighted Works," (by Alan Latman), p. 7.

And although the House of Representatives,[3] the Supreme Court,[4] and the Register of Copyrights[5] have each supported the primacy of the public interest over that of the author if a conflict should arise, copyrights are nevertheless perceived by many as miniature monopolies.

The United States operates today with a competitive, free enterprise economic system, but *not* with a competitive, free enterprise political system. It is for this reason, perhaps, that the issues surrounding copyright law revision have become so complex. The central question underlying such revision is—how *can* the public welfare be accommodated within the free enterprise economic system? Is it possible for the two systems to be reconciled?

AECT believes that some sections of the proposed bill (S. 1361) do attempt to meet the needs of both the public and free enterprise system. This Subcommittee has worked hard to prepare a bill that reflects the input of diverse interest groups. The posture of this Subcommittee has helped these groups to become more aware of and more responsive to each other's needs. Real progress has been made toward agreement upon Section 107 of the bill and its legislative history. This progress was interrupted, however, by the original opinion handed down by U.S. Court of Claims Commissioner Davis in the case of Williams and Wilkins v. U.S.—a development which was extremely alarming to the educational community. The opinion stated that the National Library of Medicine and the National Institutes of Health had committed infringements of the copyright law. If this opinion was later upheld by the full court, the doctrine of "fair use" would be substantially weakened as far as libraries and schools were concerned. Time-honored practices such as interlibrary loans would be halted immediately, and all educational uses of copyrighted materials would be sharply curtailed. The dissemination of knowledge would be regulated by the interests of a few, rather than the interest of the public.

Thus, in an effort to secure more reliable protection for the uses of copyrighted materials than "fair use" was able to provide, a proposal for an educational exemption was drafted by the Ad Hoc Committee of Educational Organizations and Institutions for Copyright Law Revision.

AECT is as much concerned as any other educator group with (a) the potential impact of the final decision of Williams and Wilkins on American educational practices, and (b) insuring that educators are able to have reasonable access to print and nonprint materials for instructional purposes. However, AECT has developed an alternative position to an educational exemption which we believe will provide sufficient protection to educators while at the same time be acceptable to the materials producers.

The full text of the AECT statement follows. Particular attention should be paid to the third paragraph, which deals with the issue of fair use.

COPYRIGHT LAW REVISION: A POSITION PAPER, MAY 1973

The members of the Association for Educational Communications and Technology (AECT) believe that technology is an integral part of the teaching-learning process and helps to maximize the outcomes of interaction between teacher and pupil.

Regulations governing United States Copyright were originally developed to promote the public welfare and encourage authorship by giving authors certain controls over their work. It follows that revisions in Title 17 of the United States Code (Copyrights) should maintain the balance between providing for the compensation of authors and insuring that information remains available to the public. Some of the revisions proposed in S. 1361 lose sight of this balance between user and producer.

AECT endorses the criteria to be used in the determination of "fair use" as contained in Section 107 of the proposed bill:

Section 107.—Limitations on exclusive rights: Fair use . . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [Section 106], for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

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[3] *House Report No. 83*, 90th Congress, 1st Sess., on H.R. 2512, March 8, 1967, p. 29.

[4] *U.S. v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

[5] *Copyright Law Revision*, Report of the Register of Copyrights, House Committee Print, 87th Congress, 1st Sess. (July, 1961), p. 27.

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Further, we endorse the concepts regarding the intent of these criteria as expanded in the legislative history of the bill as it existed prior to and without regard to the original opinion in the case of Williams and Wilkins v. U.S., for that opinion substantially narrows the scope of "fair use" and irreparably weakens that doctrine.

However, we propose that the concept of "fair use" should apply equally to the classroom teacher and media professional—including specialists in audio-visual and library resources. Media personnel are becoming increasingly important members of educational planning teams and must have the assurance that they may assist classroom teachers in the selection of daily instructional materials as well as with long range curriculum development. Classroom teachers do not always operate "individually and at [their] own volition." The fact that the media professional makes use of advance planning and has knowledge aforethought of the materials he prepares for the teacher should not invalidate the application of the "fair use" principle.

Concerning the use of copyrighted works in conjunction with television, AECT proposes that "fair use," as it has been outlined above, should apply to educational/instructional broadcast or closed-circuit transmission in a non-profit educational institution, but not to commercial broadcasting.

Once the doctrine of "fair use" has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine. We believe that the enactment of the "fair use" concept into law prior to negotiations will guard against the erosion of that concept. Generally, a reasonable fee should be paid for uses that go beyond "fair use," but such fee arrangement should not delay or impede the use of the materials. Producers are urged to give free access (no-cost contracts) whenever possible.

We agree with the Ad Hoc Committee of Educational Organizations and Institutions on Copyright Law Revision that duration of copyright should provide for an initial period of twenty-eight years, followed by a renewal period of forty-eight years, whereas the proposed bill sets duration at the "life of the author plus fifty years." It seems reasonable that provision should be made to permit those materials which the copyright holder has no interest in protecting after the initial period to pass into the public domain.

Regarding the input of copyrighted materials into computers or other storage devices by non-profit educational institutions, we agree with the Ad Hoc Committee that the bill should clearly state that until the proposed National Commission on New Technological Uses of Copyrighted Works has completed its study, such input should not be considered infringement. The proposed bill states only that ". . . [Section 117] does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with any similar device, machine, or process . . ."

A new copyright law that both users and producers can view as equitable depends upon the mutual understanding of each other's needs and the ability to effectively work out the differences. We will participate in the continuing dialogue with the Educational Media Producers Council and similar interest groups to establish mutually acceptable guidelines regarding the boundaries of "fair use," and reasonable fees to be paid for uses beyond "fair use." This dialogue will be especially important in the area of storage, retrieval, and/or transmission of materials during the time period between the enactment of the new law and the issuance of the report of the proposed National Commission on New Technological Uses of Copyrighted Works.

We feel that the above modifications of S. 1361 are needed to insure that the revised law assists rather than hinders teachers and media specialists in their work.

Briefly, the AECT position supports the legislative history relating to "fair use" developed prior to the original opinion in Williams and Wilkins v. U.S. It is our perception that until that opinion was handed down, educators and materials producers were progressing toward the development of mutually acceptable guidelines regarding the boundaries of "fair use." Our position serves to erase the dampening effect of the Williams and Wilkins opinion upon efforts at copyright law revision and negotiations between concerned parties.

A review of the complete AECT statement makes apparent our agreement with the position of the Ad Hoc Committee on many aspects of copyright law revision. AECT has been an active member of this Committee for many years, and has both influenced and been influenced by its program and policies. The work of this group has been invaluable in the attempt to secure a new law that is equitable to education. And although the AECT position differs from that of the Ad Hoc Committee on the need for a general educational exemption, we continue to remain a member of that group. AECT perceives its position and that of the Ad Hoc Committee as variations on a single theme—how to offset the distinct disadvantages dealt to education by the Williams and Wilkins opinion.

The AECT position has been well received by both educators and materials producers. Representatives of both of these communities viewed the position as a realistic step toward resolving the issue of defining the limits of "fair use." The statement is viewed by members of each group as offering protection to educators that is not offensive to the producers.

The incorporation of the AECT "pre-Williams and Wilkins" position into S. 1361 and its legislative history is essential to the development of a new copyright law that is equitable to educators and materials producers alike.

We appreciate this opportunity to present our position to the Subcommittee and trust that it will be given careful consideration as the proposed bill and Subcommittee report are completed.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES,
Washington, D.C., July 30, 1973.

Hon. JOHN J. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Association of American Medical Colleges notes with interest that the Subcommittee on Patents, Trademarks, and Copyrights is holding hearings on S. 1361, a bill for the general revision of the copyright law. Because of its interest in obtaining a maximum flow of scientific information through an efficient and up-to-date biomedical communications network, the Association would like to comment on section 108 of the bill, concerning library photocopying. We request that this letter be included as part of the record of the hearings.

The Association, now in its 97th year, represents the whole complex of persons and institutions charged with the undergraduate and graduate education physicians. It serves as a national spokesman for all of the 114 operational U.S. medical schools and their students, 400 of the major teaching hospitals, and 51 learned academic societies whose members are engaged in medical education and research. The Association and its membership thus have a deep and direct involvement in the matters of concern to the Subcommittee.

The Association is familiar with the problem of photocopying of research materials by libraries. We commend the Subcommittee in its efforts to bring up to date the current copyright legislation. We would like to point out that the present controversy over library photocopying does not truly confront the real problems of disseminating the findings of biomedical research.

There are currently three major methods by which biomedical journals help meet their production costs;

(1) First, the journals may assess researchers a page charge for publishing research findings. These fees may run into hundreds of dollars per page. This practice is becoming more common. In many cases, the federal government is subsidizing the publication of the journal, by paying for charges from research grants or contracts.

(2) A second method of meeting production costs is to charge one subscription rate to individual subscribers and a higher rate to institutions or libraries. This additional cost presumably covers loss of income to publishers by multiple use of journals. In many cases, the income from subscriptions is at least sufficient to cover production costs. Other sources of income help meet editorial and other costs.

(3) A third method of meeting production costs is the use of advertising. While certain advertising information is useful, it is not always appropriate for professional journals to be supported by a large amount of advertising.

These three methods are, of course, often combined to help the publication meet its production costs. In some instances, the result will be profit, while in others (depending on the nature of the research, the financing mechanisms, and the materials,) the publication will do little more than meet its costs.

Several solutions have been offered to permit libraries to photocopy materials without endangering the publishers' income or copyright. None of these confront the basic problem. In order to assure the unhindered flow of biomedical knowledge and information, while still achieving the most rational and responsible distribution of its costs, the Association recommends that a study be commissioned to investigate the complex set of factors involved in the transmission of biomedical information. Included in its considerations would be the determination of the number and types of biomedical journals necessary to maintain an adequate flow of the growing volume of scientific information: how the costs of these publications should be borne by the public, the researchers, the readers, and the institutions; and finally, the most appropriate role of the federal government in this area.

Until these issues are dealt with, we will continue to have an incomplete resolution of the problems of biomedical publications and an adequate dissemination of information to investigators and to a broader community of professionals who can apply the results of research to the improvement of health care.

Mr. Chairman, the Association would like to thank you for this opportunity to express its views. I and the staff of the Association stand ready to provide whatever assistance you might desire in this matter.

Sincerely,

JOHN A. D. COOPER, M.D.

STATEMENT WITH RESPECT TO THE PROPOSED "GENERAL EDUCATIONAL EXEMPTION" AMENDMENT TO THE COPYRIGHT REVISION BILL (S. 1361), SUBMITTED TO THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY BY THE ASSOCIATION OF AMERICAN PUBLISHERS

The present statement is intended to extend and amplify the necessarily brief oral statement presented to the Subcommittee by Ross Sackett, President of Encyclopaedia Britannica Educational Corporation on behalf of the Association of American Publishers, of which Mr. Sackett is Chairman of the Board of Directors, in opposition to the proposed amendment to the Copyright Revision Bill (S. 1361) granting a general educational exemption.

The Association of American Publishers in the general association of book publishers in the United States including textbooks and other educational materials. Its more than 260 members, which include many university presses and non-profit religious book publishers, produce the vast majority of all general, educational and religious books and related materials published in the United States.

The Copyright Revision Bill as it stands (S. 1361) provides many limitations on the rights of copyright proprietors that are intended to facilitate the educational use of copyrighted materials. Section 107 for the first time would embody in statute law the judicial doctrine of fair use. It would explicitly define certain uses of copyrighted works in teaching as being fair use if it meets the other specified criteria. Section 108 in certain circumstances would permit copying by a library, including a school or college library, even though it may exceed fair use. Section 108 also exempts school and college libraries from liability for infringements committed on coin-operated copying machines on their premises, provided an appropriate warning has been placed on the machines. Section 110(a) permits the non-profit performance or display of a copyrighted work in the classroom. Section 110(b) permits the broadcast of a nondramatic work in organized instructional programs. Section 112(b) entitles a school to produce and for five years make unlimited use of tapes or other records of live performances of works it broadcasts. Section 504(c)(2) relieves a teacher of liability for statutory damages if he commits an infringement and if he believed on reasonable grounds that the infringing use was a fair use under Section 107 of the act.

These numerous special exemptions for educators reflect the concern that the Judiciary Committees of both Houses and the Copyright Office have consistently shown through the long consideration of copyright revision that no unreasonable impediments should be placed in the way of educational use of copyrighted materials. Publishers share that concern. For that reason, almost all of the special exemptions now in the bill have been not only accepted but supported by publishers. Educators and educational institutions are the sole market for the educational materials produced by publishers, and are by far the most important customers of the industry. The producers and the users of educational materials are hence partners, not opponents. They share a common purpose in achieving the maximum and the most efficient use of educational materials in the actual teaching process.

The provisions of the bill as they affect educators were quite satisfactory to the Ad Hoc Committee when it testified before the Senate Judiciary Subcommittee. (See the testimony of Harry Rosenfield on S. 597, March 1967, Part 1, pp. 187–189.) Now, however the Ad Hoc Committee has revived a proposal for a sweeping exemption.

This exemption would allow anyone to make an unlimited number of copies in any form for the purposes of "noncommercial teaching scholarship or research" of "brief excerpts from literary, pictorial, and graphic works which are not substantial in length in proportion to their source" and also of the "whole of short literary, pictorial and graphic works."

It would also allow an entire copyrighted work to be stored in a computer or other automatic system for storing, processing, retrieving or transferring information, leaving the proprietor with only such control as he can achieve over the retrieval of the information.

Many, perhaps most, of the uses described by the representatives of the Ad Hoc Committee as a justification for this proposed exemption would in any case be lawful under section 107 or other provisions of the bill, particularly the reproduction of brief excerpts in ways that do not reduce the market for the original. Insofar as the proposed general educational exemption relates to uses that would be legal under 107, it is meaningless and unnecessary. The only real purpose sought by the amendment, and indeed the only purpose it can serve, is to legalize uses that a court would otherwise hold to be unfair because they are excessive in quantity or reduce the market for the original work or otherwise exceed "fair use." If no excessive uses or competitive uses are planned, the proposed amendment is simply pointless.

What are some of the uses that would be authorized by the proposed general educational exemption that *would* be likely to be held to exceed fair use today or under Section 107? The most dangerous of those probably relate to the freedom to make and distribute an unlimited number of copies of entire "short" copyrighted works without the proprietor's permission. The only limitation on this freedom would be that the copying must not be for profit, that it must be for "noncommercial teaching, scholarship, and research," that the copies of the separate whole works must not be compiled, as in an anthology, and that the materials copied must not be "consumable."

A "short" whole work is presumably an individual short story, essay, or poem; a map; a transparency; a globe; a wall chart; a slide or photograph; the score of a short music composition. It is difficult to conceive works that are shorter and yet are whole, separately copyrightable "works."

Under the proposed language a city school system, or a state department of education, or the United States Office of Education could, on a nonprofit basis, produce a dozen, or a hundred, or a thousand copies of a slide or of all of the slides a publisher has produced and make them available free, or at the bare reproduction cost, to schools in their jurisdiction for noncommercial teaching activities. Time and time again, a teacher could make multiple copies of a poem or a short story, and hand it out to members of a class or group of classes. A school could reproduce the words and music of a "short" copyrighted song for all the members of a school orchestra and choir. A school system could reproduce for every classroom a copyrighted wall chart or map; the Department of Defense could reproduce a hundred thousand copies of a short copyrighted work to use in training courses. And so through dozens of similar situations in which the uses are clearly not "fair" but would apparently be legal under the proposed language.

We are quite prepared to believe that the sponsors of the general educational exemption had no such sweeping uses in mind; but if that be true, they should not seek legislation that would legalize such abuses.

As we understand it, the sponsors of the general educational exemption assert that they do not wish to cover under the exemption uses that would injure copyright proprietors or that would go beyond what are normal and professionally approved classroom activities now. Their declared purpose is apparently not so much to *enlarge* the area in which copyrighted works may be used without the owner's permission as to define more clearly the present boundaries of that area. They would contend that the uses they envision as actually carried on under the proposed exemption would in almost every case be "fair" uses, but that teachers cannot safely rely on the doctrine of "fair use" because of its vagueness. Teachers may expose themselves to legal peril, the advocates of the exemption say, or more likely they may be deterred from making proper and desirable uses of copyrighted material because they do not know whether or not they are "fair uses" within the meaning of the law.

Admittedly the concept of "fair use", like the concept of "negligence" or of "prudence" in the common law, is one that by its very nature is not susceptible of precise and unvarying definition. But the proposed amendment does not cure this vagueness. It compounds it by introducing a number of terms new to copyright law and uninterpreted by the courts:

How short is a "short" work? Is a 15-page short story "short"? Ten pages? Five pages? Does it depend on the size of the page?

What is "nonprofit" use? Is a professor doing research which he hopes to embody in a textbook from which he hopes to receive substantial royalties engaged in "non profit" research? If he is working on a biography from which he hopes to receive modest royalties? If he is doing an article for a learned journal for which he will receive no payment but hopes for a promotion? Is the Department of Defense engaged in "non-profit" research when it puts the entire content of a highly technical set of copyrighted tables into a computer to use in designing the airfoil of a new plane? Is an aircraft manufacturer engaged in non-profit research when it does the same thing under a contract with the Department of Defense?

The very essence of such legal concepts as "fair use" (or "negligence" or "prudence") is that they *do* avoid rigid *a priori* definitions and permit a judgment of fairness and equity to be made on the basis of the application of common sense and experience to the actual situation in each individual case. To introduce certainty is to introduce rigidity. Any effort to get away from the doctrine of "fair use" and define the area of permissible use in predetermined objective or numerical terms is simply unworkable. Any such inflexible rule, if it is narrow enough to eliminate truly abusive uses of material will eliminate along with them many wholly proper uses. If it is broad enough to include all the uses we all agree are proper, it will open the door to a host of improper uses. There is simply no substitute for the use of informed and impartial judgment in the application of general principles to specific cases.

If the proposed general educational exemption is not intended to legalize sweeping uses of copyrighted material that are clearly beyond the bounds of fair use, and if it is not successful in clearly defining boundaries of use, what is the need for it?

Indeed we believe the needs that have been alleged are hypothetical and illusory. The 1909 Copyright Act under which we now live contains none of the special concessions to education that appear in S. 1361 and that we for the most part support. It is much more restrictive than S. 1361 in its present form. Yet under the present more restrictive law, hundreds of thousands of teachers, scholars, and researchers daily make millions of uses of copyrighted material. No doubt many of those uses may exceed the boundaries of what we would all agree to be fair use. Yet the result when any such well-intentioned excessive use comes to the attention of the publisher is at most a statement of concern followed by discussion and the modification or abandonment of the objection to use or else an agreement that in the circumstance it is proper or, in some cases, a license to continue the use. What are the desirable educational practices that in actual fact go unused for fear of a vaguely defined copyright liability? We have evidence of any. There is simply no reason to believe that under the copyright law as it would be liberalized by S. 1361 without the proposed general educational exemption, as well as under the 1909 law, educators and publishers would not continue to go forward as they have in the past in an easy collaboration, resolving by discussion any occasional differences in the interpretation of fair use that may arise.

But if it is difficult to see any need for or benefits from the proposed exemption, it is only too easy to see the difficulties it would bring to education as well as to authors and publishers:

(1) It would legalize the potential large-scale competitive reproduction for noncommercial teaching use of a host of "small" whole copyrighted works. The limitation of this exemption to "noncommercial teaching" is no protection to the producers of such material, for "noncommercial teaching" is substantially the whole of the market for educational material. Such large-scale reproduction would not only injure authors, producers and publishers; by the lessening of the incentive to produce such works for the educational market, it would injure teachers, students, and the whole educational process as well.

(2) By permitting the unlimited input of copyrighted material into computers and similar devices, it would effectively destroy the creator's control over his copyrighted property. The provision for copyright control over output from such a device is meaningless. It is obviously the assumption of the sponsors that the output from such a system will be of such brief excerpts as to be protected by fair use, thus eliminating copyright control at both ends. But even if the output is not protected under fair use, it is obviously unrealistic to apply copyright protection at that point. It is in the nature of the operation of a computer or similar system that one does not know what its output will be until it has in fact been pointed out. There is no way the prior permission of the copyright proprietor can be obtained. He is presented with a *fait accompli*. On the other hand it is perfectly feasible to get the permission of a copyright proprietor *before* the input of the material, and such permission can include the manipulation, processing, and output of the material as well.

(3) By establishing a presumption that the kinds of uses authorized by the general educational exemptions are not "fair uses" that would be protected by Section 107, it would actually in many ways narrow the protection afforded educators. By departing from the flexible "fair use" concept and endeavoring to define specific exemptions, it establishes the presumption that uses not specifically exempted are infringements. This may work to the serious detriment of educators and education as new and unforeseen materials and uses are developed in the future, to which the doctrine of "fair use" could be applied, but which fall outside the specific exemptions this amendment would provide.

(4) It would upset the balance of compromises carefully worked out in the past by the subcommittee. Its sweeping and imprecise language overlaps many other sections of the bill. To give serious consideration at this late date to the educational exemption would require the committee to reexamine at least the fair use provisions of Section 107, the library reproduction provisions of Section 108, and the classroom teaching provisions of Section 110.

(5) The provision of the general education exemption are, of course, in complete contravention of Section 117 and of the intention of Title II of S. 1361. It was this subcommittee that concluded that the problems of computer use of copyrighted material were too complex to be acted on legislatively without further impartial expert examination. The subcommittee proposed, in Title II, the creation of a National Commission on New Technological Uses of Copyrighted Works to make a thorough study of this and related problems. Meanwhile, by Section 117 the subcommittee proposed that all rights with respect to computer and related uses be frozen precisely as they are under present law pending the report of the Commission. This was a statesmanlike proposal, completely accepted by all the various conflicting interests concerned including, at the time, the sponsors of the general educational exemption. Now, however, those sponsors have proposed to upset this entire understanding, abolish Section 117, and bypass the impartial study proposed in Title II, subverting the whole carefully constructed arrangement.

There is a further major objection to this sort of specific exemption. We are living and working, in 1973, under the provisions of the Copyright Act of 1909. It is likely that any general copyright revision act this Congress will pass will remain the law of the land until far into the twenty-first century. It will need to be applied to meida of communication and forms of reproduction and use not now even conceived of, just as the 1909 Act has had to be applied to television, satellites, and computers.

When the 1909 Act provided general principles and policies through its general definition of the rights of authors and through its silence on fair use, thus allowing the prior judicial doctrine to prevail, it has been possible for the courts in acting on individual cases and private parties by contractual arrangement to apply the principles of the Act to the new media without undue strain. It is the highly *specific* provisions of the 1909 Act attempting to go beyond principle and fix details, that have become anachronistic and unworkable—provisions like the manufacturing clause, the so-called "juke-box" amendment, the fixed 2¢ royalty for mechanical rights, etc. These detailed provisions have had totally unintended consequences in the face of new media and radically new circumstances.

No one is wise enough in 1973 to devise the sort of specific and detailed provision in the general education exemption, intended to govern copyright for decades to come. What is needed, with respect to the concerns we are dealing with here, is a general definition of the exclusive rights of authors and their assignees, as in Section 106, and a general assertion, as in the present Section

107, that these exclusive rights shall not bar those fair and non-competitive uses of copyrighted works for socially desirable purposes that are covered by the broadly and flexibly conceived doctrine of fair use. Both now and as new media are introduced in the future, realistic applications of these general principles can and will be worked out.

Denial of the unwarranted educational exemption will not "deprive" teachers of any "right" they may erroneously feel is possessed under existing law. "As shown by a Copyright Office study dated July 22, 1966, the educational groups are mistaken in their argument that a 'for profit' limitation is applicable to educational copying under the present law." (House Report No. 83, 90th Congress, March 8, 1967.)

In its Report, the House Judiciary Committee said that "the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use. It suggested however that teacher and publisher should join together to establish ground rules for mutually acceptable fair use practices, and that they should work out means by which permissions for uses beyond fair use can be obtained "easily, quickly, and at reasonable fees." (pp. 32–33)

We share the views expressed by the House Judiciary Committee. We urge that they be adopted by this Subcommittee and that the proposed educational exemption be rejected out of hand.

For our part, we renew our offer to meet with the Ad Hoc Committee to establish ground rules for fair use and to establish workable arrangements for the clearance of permissions for uses beyond fair use.

STATEMENT OF THE ASSOCIATION OF RESEARCH LIBRARIES, ON THE AMENDMENT RECOMMENDED BY THE LIBRARY ASSOCIATIONS TO S. 1361, GENERAL REVISION OF COPYRIGHT LAW

In order to clarify the proposed amendment and distinguish between it and the language of S. 1361 in its present form, it appears desirable to discuss the sections of the amendment and then to note the difference between these provisions and those of S. 1361.

The initial paragraph of section d reads the same as section d in the printed Bill except that the phrase "but only under the following conditions" is substituted for the word "if" at the end of the paragraph.

Section (1) under d of the proposed amendment refers only to an article or other contribution to a copyrighted collection or periodical issue or to a similar small part of a work. The purpose of this amendment is to enable libraries to continue to supply a photocopy of a small part of a work without being required to do any checking to see whether the issue of the periodical or the book in which the item appears is available for sale. This is particularly important with respect to articles in periodicals, since there is no easy way to determine whether or not a particular issue of a periodical is still available from the publisher or dealer. Even if it should be determined that an issue can be ordered from the publisher, the time required to place the order and receive the issue results in a delay which will probably not meet the need of the user.

Section (2) refers to an "entire work," that is, a book or a major part of a book. In this case the amendment would require that the library determine whether or not the book is still in print before providing a photocopy of it. This can be done with relative ease by checking *Books In Print*.

The distinction may be put in this way: section (1) refers to a periodical article or short excerpt of which a photocopy may be provided without any checking. Section (2) refers to an entire book or a major part of it and in this case a check to see whether the book is still in print is required.

Section (2) of the proposed amendment is similar to section 108(d)(1) in the printed Bill, S. 1361. Section (1) of the proposed amendment is a specific exemption for a periodical article or short excerpt. In this respect, it is an addiction to S. 1361.

"REASONABLE INVESTIGATION"

The phrase "reasonable investigation" is used in the amendment which we are recommending but only in section 108(d)(2). This section refers to books, not to periodical articles. A reasonable investigation of the availability through trade sources of a book can easily be made by checking the annual catalog *Books In Print*. There is no comparable catalog listing all periodical articles.

Section 108(d)(1) of S. 1361 requires the reader to "establish to the satisfaction of the library or archives that an unused copy can not be obtained at a normal price from commonly known trade sources in the United States including authorized reproducing services." This requirement applies both to periodical articles and to books. It can be complied with as regards books through the use of *Books In Print*. There is no feasible way of making a comparable check of the availability of periodicals. *Effects of Library Photocopying on Copyright Proprietors.*

Those who oppose the proposed library photocopying amendment take the position that library photocopying eliminates sales and reduces the number of subscriptions to periodicals. The most extreme charge is that library photocopying will result in destroying scientific and technical communication by making it economically impossible to continue the publication of periodicals and books.

The importance of the partnership of libraries with the publishing industry cannot be over-emphasized. The economic viability of this industry is indeed a crucial concern to all involved in the dissemination of information. It is difficult, however, to get precise information regarding the effects of photocopying on publication sales. A most important consideration here is that coin-operated photocopying machines are available to virtually everyone. Thus, a significant and ever-increasing amount of photocopying is unsupervised.

In regard to supervised library photocopying, several studies have been made in the past 12 to 15 years and it is the conclusion of these studies that no evidence of significant economic damage caused by library photocopying could be identified. While the general experience is that the number of subscriptions has increased, there have been exceptions to this but it is by no means clear that the decline in the number of subscriptions have increased very substantially in this period and library budgets, particularly in recent years, have been reduced; thus the canceling of subscriptions cannot be fairly ascribed to library photocopying only.

If it were possible to demonstrate clearly that library photocopying had severely damaged copyright proprietors, it could be expected that publishers would produce this evidence. Since they have not done so, it would appear that the evidence is not persuasive. In the absence of conclusive evidence, it would be most unfortunate if requirements were established for the payment of royalties which would involve "spending dimes to collect pennies."

LIBRARY ASSOCIATIONS SUPPORT THE AMENDMENT RECOMMENDED

The amendment in the form in which it has been recommended to the Subcommittee represents the views and recommendations of the American Library Association, the Association of Research Libraries, and the Medical Library Association. These Associations recommend this amendment on behalf of their readers in order that they may be able to maintain the photocopying services now provided by most libraries of all types. In the aggregate the number of readers who use the libraries represented by these Associations runs to many millions. It is on behalf of these readers that the Library Associations urge the Subcommittee to adopt the amendment which they have recommended.

The statement was made in the course of the hearings that machine-monitoring of materials copied was feasible. However, at the present time there is no practical way that a photocopy machine could differentiate existing copyrighted from uncopyrighted materials.

STEPHEN A. MCCARTHY,
Executive Director.

August 9, 1973.

HOUSE OF REPRESENTATIVES,
Washington, D.C., August 7, 1973.

Hon. JOHN L. MCCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MCCLELLAN: It is my understanding that the Senate Subcommittee on Patents, Trademarks, and Copyrights has been considering Section III of S. 1361 which sets a copyright fee schedule for the cable television industry. I further understand that in 1971 a consensus agreement was formulated by representatives of the copyright holders, broadcasters, and cable system operators and that in this agreement is a provision calling for arbitration if rates cannot be agreed upon.

It has always been my belief that Congress should not attempt to set rates in transactions between private individuals or groups and I believe this to be true in regard to copyright fees. The parties that operate with the fees should be allowed to determine them, and for this reason I urge you to reconsider Section III and make provisions instead, for a means of arbitration to determine the fees.

With kind regards, I am,

Sincerely yours,

ALPHONZO BELL,
U.S. Congressman.

STATEMENT OF PROF. ALBERT P. BLAUSTEIN, RUTGERS UNIVERSITY SCHOOL OF LAW

Scholars should be paid for their scholarship. This precept is followed in our treatment of the scholars who, as teachers, purvey scholarship and who, as librarians, organize and process scholarship. It should be nonetheless true for the creators of the scholarship which is being purveyed, organized and processed. On this there seems to be agreement.

Those who pursue scholarship are in the vanguard in the struggle for higher salaries for teachers and librarians. They are the most prolific purchasers of the ever-more-costly source of scholarship known as books. And so it goes.

But when this principle is translated into payment for scholarship whose access is via the photocopy machine, there is a strange objection to payment. Payment for scholarship, that is. There is, on the other hand, no objection to indirect payment for that scholarship in the form of machine purchase and rental, the purchase of accessories such as chemicals, paper and repair services and, in many cases, wages for those who operate the machines.

The time has come to face this problem: it can be delayed no longer. The intellectual property of others is being used via reprography in a quantity which must receive our attention.

PROPOSAL

Ten per cent of the net cost of reprography should go to the copyright proprietors of the intellectual property being photocopied.

I speak as a university professor, a lawyer, an author, a former librarian, and as one who teaches in the field of intellectual property. In each of these roles I have made use of the scholarship of others. Frequently their material has been made available to me through reprography. In performing the functions of librarian, I have made the scholarship of others available to the researcher and educator; and I know the importance of satisfying the research needs of others as well as myself. As an author, I have seen many of my articles, books, and parts of books reprinted in other publications for compensation and photocopied by researchers and educators without compensation. And since I teach the Intellectual Property course at Rutgers-Camden, I have gained familiarity with the background as well as the law in this particular field.

In preparing this statement, an examination has been made of the many proposals which previously have been submitted. And I must acknowledge at the outset that these have, in some measure, guided and influenced the proposal here. However, most of them have been set aside as unworkable because of their complexity and because of their high cost of administration. (This is also a time to express thanks for the research assistance of one of my students, Mark Gertei, who assisted me in preparing this statement.)

In setting forth this basic proposal, the procedural problem is divided into three parts: (1) How shall royalty payments be collected? (2) Who should administer the royalties collected? and (3) How should the royalties be distributed?

IMPOSING ROYALTY CHARGES

Royalties for the copyright proprietors of material being photocopied should come from a flat fee tax. This would be in the form of a ten percent surcharge on the selling price or the regular monthly rental of all photocopy machines.

The advantages of such a plan are as follows:

A. While the total royalties will eventually be substantial, the individual sums paid by the user are de minimus. The overall rental charge on photocopying today is under four cents per page. (And the base rates are even lower in the rentals to government and educational users.)

B. The plan is administratively sound. The cost of collection would be at a minimum. Note in this connection the precedent of Article 53 of the German Copyright Act of 1965 which places a flat fee of five per cent on the sale of visual or sound recorders.

There are several objections which have been raised to the imposition of an arbitrary flat fee tax. It is, of course, obvious that many photocopy machines are not used to reproduce copyrighted materials. One might illustrate this by examining the photocopy equipment in a teaching hospital. The machine in the hospital administrative office, for example, reproduces hospital records, clerical accounts, etc., almost exclusively. On the other hand, the photocopy machine in a medical library is always a major user of copyrighted material. The answer is partly that it "evens out." And the administrative costs involved preclude making distinctions between where machines are located—using this as a basis for determining royalty rates.

What of the counter-suggestion that the tax be based solely on the extent of use—rather than sales price or monthly rental. This is certainly possible in imposing a royalty surcharge on sound equipment. Rather than tax the sale of the tape recorder, there could be a tax on the sale of tape. In that manner, the user who merely records a favorite song for home consumption would pay only a negligible sum for royalties. On the other hand, the large commercial user of copyrighted music would buy tapes in quantity and thus pay a much higher royalty. Such a scheme is impossible with photocopy machines since they are increasingly able to use ordinary rather than specially treated paper. Note, however, that the factor of use is already considered and built into current rental charges. Most of the large producers of photocopy equipment charge a base fee of $35.00-$50.00 a month, plus a figure based solely upon the number of copies made.

A third objection is raised by educators who argue that any tax, regardless of how small, is an interference with the free dissemination of necessary educational material. Theoretically, this position is indefensible. As a practical matter, it should not preclude a minimum royalty charge. The key is access to information. And access is always thwarted by a series of variables involving cost. The educator may be barred from the utilization of educational materials by the fact that the school system does not have adequate secretarial help, or because the school library did not buy the books which contained the desired works of scholarship, or because the school board vetoed the purchase of sufficient photocopying equipment. And where such equipment is acquired, the bulk of the cost is for rental, paper and chemicals. Measured against all of these factors, a royalty tax, in the form discussed here, really does not preclude the use and dissemination of educational materials.

Caveat: With the payment of the ten percent tax, users would be free to photocopy all copyrighted materials, with one notable exception. Consumables (meaning workbooks, standardized test forms meant to be used only once, etc. must be excluded from the photocopy grant.

ADMINISTRATION OF ROYALTIES

For the administration of any royalty plan, it is essential to set up a central copyright clearing house to supervise the collection and distribution of the ten percent surtax on sales and monthly rentals.

It is recommended that this clearing house have a quasi-governmental status provided for in the copyright statute. This would have the following advantages:

(1) Enforcement of payment would be facilitated. Failure to pay royalties would constitute a criminal rather than a civil offense.

(2) As a quasi-governmental entity created by statute, the anti-trust problem would be avoided.

(3) As a quasi-governmental agency operating under statute, it would be more difficult for any particular combination of selected publishing houses to gain control.

(4) An agency under governmental sponsorship would discourage the formation of splinter groups or alternative clearing houses set up to give special protection to special interests.

The membership of the clearing house would consist of all participating publishers. Royalties would be paid to the copyright proprietors only via these member-publishers.

(In addition to its administrative arm, the clearing house would also have an agency (or agencies) to perform as quasi-judicial tribunals. It would be the responsibility of one such tribunal to determine who would be a bona fide publisher. Another tribunal responsibility would be to hear arguments on royalty distribution.)

DISTRIBUTION OF ROYALTIES

The greatest percentage of the moneys received and administered by the clearing house would be paid over to the member-publishers. The relative distribution as between the publishers and their authors (as copyright proprietors) would be allocated in accordance with their author-publisher contracts.

The most difficult administrative problem is the allocation of royalties among the various publishing houses. This must be based, as far as possible, upon the frequency with which certain materials are photocopied. At the same time, the plan must be kept as simple as possible.

It is recommended that all copyrighted books, periodicals and other publications be divided into five categories, depending upon the extent to which they are usually photocopied. Each publisher would have so many "units" in each category. (A monthly issue of a given oft-copied scientific journal might be a unit to the same extent as a given textbook.)

Category A units (those most frequently copied) would receive fifty per cent of the total royalties. Category E, containing those units copied the least, would include all novels, for example, and might be limited to as little as two per cent of all royalties. Initial category assignments would be based on a preliminary sampling—and updated by subsequent samplings.

It would be the responsibility of an administrative arm of the clearing house to decide what book, annual or magazine issue constitutes a "unit" and to determine the proper category for each. Appeals would be made by the publishers to one of the clearing house tribunals.

As noted above, the bulk of all moneys received by the clearing house (after administrative costs are deducted) would be distributed to the publishers. However, it is proposed that twenty per cent of the net total be allocated (and administered by the clearing house) for the benefit of authors as a whole. Part of this sum could be designated for awards, scholarships, loans, pension arrangements, group medical services, insurance, etc. And other funds could be used to maintain and operate authors' associations and other agencies working for the benefit of those who produce intellectual property.

My thanks to the Committee for giving me the opportunity to express my position on this important issue now before the Congress.

CADCO,
OKLAHOMA CITY, OKLA., *July 24, 1973.*

Hon. JOHN L. MCCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MCCLELLAN: I am writing this letter in regard to hearings scheduled before the Senate Judiciary Committee, sub-committee on Patents, Trade-Marks and Copyrights, this coming July 31 and August 1.

The purpose of these hearings is to take testimony on pending Senate Bill S. 1361, and more particularly on section 111 of that bill; as it relates to CATV systems.

Section 111 of this proposed bill contains an "exemption from copyright liability" and "program exclusivity (for) CATV systems with fewer than 3,500 subscribers".

My company, CADCO, INC., is a manufacturer of CATV equipment. My company specializes in the manufacture and installation of CATV equipment for CATV systems in towns of 10,000 people and down. This happens to work out to CATV systems with 3,500 or fewer homes.

My company publishes a more-or-less monthly publication for our customers in this area of CATV; a copy of the most recent issue of which is enclosed. Our TECH TALK publication reflects the operating and technical problems of this segment of the CATV industry; and it does so because other publications and companies in this industry do, for the most part, ignore this portion of the market place.

CADCO is known within the CATV industry as "the small town specialists". And this extends much further than merely supplying equipment to these smaller communities; it includes providing know how and a rallying point for the operators of these CATV systems.

Now it is proposed, in Section 111 of this bill, that "CATV systems with fewer than 3,500 subscribers, *now in existence*, and independently owned, be exempted from the copyright" payment schedule that this bill provides for.

I would like to draw your attention to the enclosed issue of TECH TALK. On pages one through three of this issue is a synopsis of a Technical Report issued by the Office of the Chief Engineer of the Federal Communications Commission (Report Number T-7301). This report shows that based upon an FCC study of the CATV industry, that approximately 91% of all operating CATV systems have *fewer* than 3,500 subscribers. And in fact, that the *smallest* 50% of all CATV systems (i.e. half of the actual systems) average 345 subscribers each.

This bill, then, would exempt 91% of all *existing* cable system from the payment of copyright liabilities. The key word is *existing*.

Please refer to page 19 of the same enclosed issue of *TECH TALK*. This article ("Isn't It About Time—Again?") relates to the very distinct difference within the CATV industry between "cable television" and "Community Antenna Television." Briefly, cable television is any system with more than 3,500 subscribers; Community Antenna Television is any system with fewer than 3,500 subscribers.

And yet, both "Community Antenna" and "Cable" are being regulated, by the FCC, and through this proposed Copyright Bill, as if they were of the same.

They are not. "Community Antenna" television service is a simple service that allows people in distant communities to receive better broadcast television. "Cable" television is much more than that. "Cable" television is pay-for-a-movie television (via the cable); it is reading electric meters via the cable; it is subscriber-response polling via the cable, and much more.

The point that I would like to try to make is simply this:

(1) The National Cable Television Association has represented to this Committee that they represent "the industry." The truth is that they represent the "cable television" industry; *not* the "Community Antenna" industry.

> (A) The President of the NCTA, Mr. David Foster, is scheduled to appear before this Committee to "speak for the industry". Our contention is that he may speak for 9% of the CATV systems in the industry, and that these 9% of the systems may represent a large number of cable subscribers; but they do not represent a large number of systems—certainly *not* Community Antenna systems.

(2) There are spokesmen within the "Community Antenna" industry who could and should be allowed to present the views of the other 91% of the CATV industry. I would like to urge that some way be made to allow such a presentation before this Committee.

We are dealing with small communities, and normal, un-sophisticated community *antenna* reception. And we are dealing with a proposal which would allow the existing small systems to operate without copyright liability, while any new small "Community Antenna" systems will (under the terms of this bill) be required to pay copyright fees. We believe this is wrong.

Please give our proposal some consideration. The 91% of the CATV communities we speak on behalf of total nearly 5,000 in all. I believe they have a right to be heard . . . and David Foster of the NCTA does not speak for them.

Sincerely,

ROBERT B. COOPER, Jr.,
President.

COLUMBIA BROADCASTING SYSTEM, INC.,
New York, N.Y., August 7, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On July 31 and August 1 the Subcommittee on Patents, Trademarks and Copyrights held Hearings on several Copyright Revision Bill subjects, including cable television, but that subject was specifically limited to the royalty schedule contained in § 111 of S. 1361 for the compulsory licensing of cable television systems.

CBS was not invited to appear at the Hearings nor did we desire to do so in view of the fact that the cable television part of the Hearings was limited to the specific subject of the royalty schedule. Our concern is more general—the proper place of cable television in the copyright context. Therefore, we take this opportunity to set forth the CBS position on that. We respectfully request that this letter be made a part of the record of the Hearings.

Preliminarily, it is useful to note what are the functions that a cable television system performs when it retransmits broadcast signals to its subscribers. Only one week before its decision in *Fortnightly* v. *United Artists*, 392 U.S. 390 (1968), the United States Supreme Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) said that:

"CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." 392 U.S. at 163.

When the Court decided *Fortnightly* a week later the function of distant signal importation was not before it; the function of the use of advanced antenna technology and equipment to overcome adverse topographical conditions to permit subscribers to receive signals already in the community, and that function only, was.

The United States Court of Appeals for the Second Circuit decided *CBS* v. *Teleprompter*,—F. 2d—177, USPQ 225, on March 8, 1973. In its decision it held that:

"When a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, we believe that, to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals. . . . The system's function in this regard is no longer merely to enhance the subscriber's ability to receive signals that are in the area; it is now acting to bring signals into the community antenna, erected in that area." 177 USPQ at 231.

Consequently, the Court of Appeals went on:

"We hold that when a CATV system imports distant signals, it is no longer within the ambit of the *Fortnightly* doctrine, and there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it. For this reason, we conclude that the CATV system is a 'performer' of whatever programs from these distant signals that it distributes to its subscribers." 177 USPQ at 231.

CBS believes that the Court of Appeals is right in concluding that there is no reason to treat a cable television system, which brings a copyrighted work to a distant audience who would not otherwise receive it, differently from any other person who performs the same function. Moreover, we see no reason for the law to be changed so as to grant cable systems discriminatorily preferential treatment. Treating them in the same way as other users of copyrighted works are treated would only require that cable television systems secure licenses from copyright proprietors just as do the broadcasters with whom they compete.

Not treating the cable systems to complusory licensing, as S. 1361 proposes to do, would eliminate the necessity of:

The recording by capable systems of notices in the Copyright Office and the prescription of regulations for them by the Register of Copyrights (§ 111(d)(1)).

The deposit by cable systems with the Register of Copyrights of statements of account every three months and the prescription of regulations by the Register of Copyrights for the deposit (§ 111(d)(2)(A)).

The deposit by cable systems with the Register of Copyrights of the prescribed graduated royalty fees and the prescription of regulations for the deposit by the Register of Copyrights (§ 111(d)(2)(B)).

The annual filing of claims by persons (who have a sufficient financial stake as well as the means and energy to do so) entitled to fees with the Register of Copyrights and the prescription of regulations for such filing by the Register of Copyrights (§ 111(d)(3)(A)).

The annual determination by the Register of Copyrights about whether a controversy exists concerning the distribution of royalty fees (§ 111(d)(3)(B)).

The determination and deduction of his administrative costs by the Register of Copyrights, the distribution of royalty fees to those entitled to them, and if the Register has found a controversy to exist, a certification to that effect and the constituting of a panel of the Copyright Royalty Tribunal (§ 111(d)(3)(B)).

The maintenance of 15% of the royalty fees collected in a special fund and their distribution according to regulations prescribed by the Register of Copyrights to the copyright owners of musical works (§ 111(d)(3)(C)).

The withholding from distribution by the Register of Copyrights or the Copyright Royalty Tribunal of an amount either one deems sufficient to satisfy all claims with respect to which a controversy exists (§ 111 (d)(3)(D)).

Nor would the Copyright Royalty Tribunal created by Chapter 8 of the Bill be required to exercise the functions of making determinations concerning the adjustment of the copyright royalty rates or the distribution of the royalty fees provided for in the cable television compulsory license.

Nor would the Houses of Congress have the burden of deciding whether to exercise a right of veto against a time deadline, reflecting their judgments about royalty adjustments recommended by the Copyright Royalty Tribunal, as provided for in § 807 of the Revision Bill.

Nor would be courts be burdened by the necessity of reviewing determinations of the Tribunal concerning the distribution of cable television royalty fees, as provided for by § 809 of the Revision Bill.

CBS believes that it is not possible for any official or any Copyright Royalty Tribunal, or any other such body, to set royalty rates that are "reasonable". By what criteria of reasonableness could the determination be made? Moreover, by what criteria would the Register of Copyrights be guided in distributing the royalty fees to copyright proprietors who file claims for them? What weight, if any, would be given to the quality of the copyrighted works? How would the Register of Copyrights attempt to measure quality when no guidelines are provided by the Revision Bill? Nor does the Revision Bill provide guidelines for the Copyright Royalty Tribunal to make judgments about the distribution of the royalty fees in the controversies certified to it by the Register of Copyrights.

The fact is that there is no adequate substitute for the operations of a normal marketplace in which prices are determined by supply and demand. If such a marketplace were permitted to function, consistently with other marketplaces in our free enterprise economic system, the problems which are insolvable by officials and tribunals would be solved by bargaining in the marketplace. The expenses of the operation would be borne by those who deal in the marketplace as contrasted with the expenses of the labyrinthical, top-heavy, governmental structure contemplated by S. 1361, part of the expenses for which would be taken out of the royalty fee fund and part of which would be taken out of the American taxpayer.

A normal marketplace does not now exist for cable television, but copyright proprietors would certainly find a way of selling their rights if cable were paying for them. All other copyright users have managed to find a way of dealing with copyright proprietors. The present lack of a market is due to the uncertainty, which is only now being resolved in the courts, over whether cable television systems are liable to the normal application of copyright law and the consequent unwillingness of cable television systems to bargain and pay for what they retransmit.

As noted above, on March 8 of this year the Court of Appeals for the Second Circuit unanimously held in *CBS v. Teleprompter* that cable television systems are liable under the present law for the carriage of copyrighted programs contained in distant signals which they import. Petitions for review by the United States Supreme Court were filed in early June; we expect the Court to act on the petitions in the fall of this year; thus, it is probable that the Court's decision will finally determine the copyright question in the near future.

This being so, CBS suggests the wisdom of awaiting the outcome of the copyright test case rather than acting on Section 111 of S. 1361, which the Congress may find unnecessary in light of whatever action is taken by our highest court. After all, we are not without a Copyright Law; the only questions are what it means and whether that is unjust. We shall have the answers presently. Only if it is unjust should it be changed.

We believe you are aware of the fact that CBS has consistently taken the position that cable television systems should have a copyright exemption for retransmission of television broadcasts to their subscribers who are within the normal coverage area of the station originating such broadcasts, subject to certain conditions to assure fairness. We reaffirm that position because we believe that such an exemption is justified by the need for simplicity and by the expectation of the broadcaster, and those who license his use of their program material, that the broadcast station's signal will reach the entire public in its normal broadcast area. The Circuit Court's decision, review of which is now sought, accomplishes that result.

There is one incongruity in Section 111 of S. 1361 we should like to call to your attention. Section 111 makes it a copyright infringement for a cable television system to carry a professional sporting event into the local service area of one or more television stations—when none of the stations has been authorized to broadcast the event. Apparently it is felt that even with the payment of the statutory royalty for the compulsory license which the Revision Bill would provide, it is unfair—to the sports promoter, to the league, to the broadcaster, or to all three—for a cable television system by its unilateral action to frustrate the consensual agreement of the marketplace. Yet the Revision Bill shows no similar concern in the identical situation for the copyright owner of any other kind of copyrighted work, no matter what its importance, even though he had deliberately chosen to license the work to no local station. It seems to us that logic would require that the copyright proprietors of news and entertainment programs be treated no less favorably than the promoters of professional sporting events.

Respectfully,

ROBERT V. EVANS.

STATEMENT OF THE COMMUNITY ANTENNA TV ASSOCIATION (CATA)

AUGUST 10, 1973

CATA is a national association of small CATV systems whose problems and interests materially differ at times from those confronting large scale cable television operations and established cable systems in major television markets.

CATA was formed in late July 1973 at Dallas, Texas to serve as spokesman for small CATV operators. Although CATA is still in its formative stages as an organization, its membership already includes more than 100 CATV systems—most of which are family owned and operated—serving in excess of 90,000 subscribers throughout the United States.

CATA was not in a position to present its views concerning Section 111 of S. 1361 to the Subcommittee at its August 1, 1973 hearings. CATA representatives did, however, attend the hearings and are familiar with positions taken by interested parties who testified. CATA welcomes this opportunity to present its views on a single critical issue: whether small CATV systems should be subject to copyright liability.

Small CATV systems perform valuable services to the public by assuring adequate, dependable, television reception in communities and areas beyond major television markets. Costs of system operation, particularly expenses of upgrading plant necessitated by FCC enactment in March 1972 of technical standards, and other construction expenses, have been increasing at a very rapid rate. As the Subcommittee knows, the ability of small system operators to raise capital has been quite limited. Also, their ability to increase subscriber rates is often restricted, if not by the terms of their franchises, certainly by economic realities in the markets served. Moreover, most cannot and do not desire to initiate ancillary broadband services in order to gain additional revenues. Clearly, these small systems merit the kind of "breathing space" assured by a copyright exemption based upon size.

CATA recognizes that jurisdiction over copyright matters resides exclusively in the legislative branch. CATA cannot, however, ignore the fact that the Federal Communications Commission and the President's Office of Telecommunications Policy called various interested parties together in 1971 to hammer out a compromise among the several industry groups regarding the emergence of the cable television industry. Despite the fact that these FCC-OTP sanctioned negotiations had no legislative power and no jurisdictional control over the copyright question, compromises were reached on a wide range of issues affecting the cable industry, including certain agreements dealing with copyright. The entire package of agreements has become known as the "Whitehead Consensus Agreement". The Whitehead agreement, while not binding upon Congress, did contain a provision calling for the exemption from copyright liability of certain CATV systems—those with fewer than 3,500 subscribers. We raise this point not to say that the Whitehead agreement in any way controls the Subcommittee's thinking regarding the copyright issue, but rather so that the Subcommittee will understand that numerous small CATV operators acquiesced in the many unfavorable aspects of the Whitehead agreement because they believed that the broadcasters and copyright owners would offer their support for copyright legislation containing an exemption for small CATV systems. Hence, if denied the copyright exemption, the small cable systems will lose the single most important reason for accepting the various provisions of the Whitehead agreement, many of which have been carried over to the present Copyright Bill, as well as the FCC's CATV regulations enacted in March 1972.

Thus it was unexpected that Section 111 of the legislation approved by the Subcommittee lacked a small system exemption: CATA respectfully urges that

S. 1361 include an exemption from copyright liability for CATV systems having fewer than 3,500 subscribers. We understand there is no significant objection to the inclusion of such an exemption and will discuss why we believe it would serve the public interest.

As noted earlier, CATV systems in the below 3,500 subscriber category for the most part provide their subscribers with a basic service for improving television reception. Most of these systems operate solely as a means of delivering television signals to communities where normal television reception is poor or nonexistent; communities beyond the primary service areas of television broadcast stations; communities in which other secondary transmission facilities such as translators are either lacking or inadequate; communities near large cities but situated in pockets of poor reception produced by terrain barriers.

Some small systems also engage in limited local originations, generally of an automated nature (time and weather scan). Few if any such systems carry advertising, engage in pay television operations or operate their own microwave relay systems. They are, in short, the traditional community antenna television systems—locally owned and operated—which had their genesis in the mountainous regions of Pennsylvania and Oregon in the late 1940s, and which continue to depend upon subscriber revenues for economic support.

Although overlooked by the Federal Communications Commission when it revised its program exclusivity rules in 1972, small systems were taken into account when the agency enacted its mandatory origination requirement (47 C.F.R. § 76.201(a)) in 1969. 20 FCC2d 201. Section 76.201(a) exempts systems with fewer than 3,500 subscribers from origination cablecasting, principally for economic reasons.

In its regulation of the broadcasting and common carrier industries, the Commission has evidenced a similar concern for the development of small communications companies. Exemptions from and exceptions to generally applicable, but often burdensome regulatory requirements, are not uncommon and have been construed to serve the larger public interest.

In the common carrier field, for example, small communications carriers were recently exempted from having to submit comprehensive economic data and information to support tariff revisions. *See* 47 C.F.R. § 61.38(f). The FCC noted that carriers with "small revenues", limited service areas and "few customers" should not have to undertake the costly and elaborate reporting procedures required of larger carriers. *Final Report and Order* (*Docket No. 18703*, 25 FCC 2d 957, 965–66 (1970).

With reference to broadcasting, the FCC recently embarked upon a comprehensive program of "re-regulation." Many of its rule revisions grant relief to small market broadcasters from certain burdensome regulatory requirements. Similiarly, in rule making proceedings involving the renewal of broadcast licenses and the ascertainment of community problems by broadcasters, the FCC has recognized that factors such as market and station size may well warrant the application of different and less stringent standards to certain classes of licensees. Indeed, in an *Interim Report and Order* relating to broadcast license renewals, the FCC has exempted radio stations from newly-enacted annual reporting requirements applicable to television licensees and has promised to re-evaluate in a year whether it is desirable to require radio broadcasters to continue to adhere to additional locai public file requirements imposed upon all broadcasters.

Finally, in the television broadcasting field, numerous rules and policies have been designed to favor UHF development and in some cases to exempt UHF licensees, which often are small businesses when compared to their VHF counterparts, from requirements applicable to VHF licensees. For example, 47 C.F.R. § 73.636, NOTE 8, provides for possible *ad hoc* exemptions to UHFs from duopoly restrictions consistently applied to VHF licensees. In addition, the FCC has a long-standing policy of fostering UHF development. This policy has been reflected in rules governing the agency's regulation of CATV systems. *See e.g.*, 47 C.F.R. § 76.61(b)(2).

The United States Congress has also gone on record many times in support of efforts to assist in the development of UHF television stations. One can also look to various statements by members of the Senate and House expressing concern for similar legislation to assist in the growth of FM radio stations. *See e.g.*, S. 585. The list goes on when one looks to the Congressional hearings regarding the need for more frequency space to be allocated to the land-mobile spectrum. Even in this 93rd Congress concern for small businesses is evidenced by hearings held by Senator Thomas McIntyre regarding how broadcasters and

CATV systems are burdened by the thousands of pages of government forms which must be filled out each year. The United States Congress has always been the single body which the small businessman could look to for protection from the burdens of over-regulation.

Thus, there is ample support at the FCC for exempting small (below 3,500) CATV systems from certian economically burdensome operating requirements; more generally, there is support in that agency and in the Congress for assisting—whether by exemptions, exceptions to rules or special affirmative laws, rules and policies—other small communication entities in providing efficient and economical service to the public. The relatively limited exemption which CATA advocates, will do just that for small CATV operators, benefitting them and their subscribers consistent with the objectives of the Communications Act of 1934, as amended (47 U.S.C. §§ 151 *et seq.*) and is in no way contrary to or inconsistent with basic copyright principles and Section 111.

CATA respectfully urges that such an exemption for small systems—those with fewer than 3,500 subscribers—be included in Section 111 of S. 1361.

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washington, D.C., August 22, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Senate Committee on the Judiciary, New Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in response to your letter of August 6, 1973, requesting the views of the Copyright Office on several points in reference to the pending bill for general revision of the copyright law, S. 1361: (1) our specific comments on the language of S. 1359, including our recommendation of appropriate amendments; (2) whether the public display of original works of art would constitute publication and would therefore require a copyright notice on the work displayed, a proposal to establish a special form of notice for works of art, and a proposal regarding placement of the notice on works of art; (3) technical objections raised by the Counsel for SESAC to the language of section 112(c) of S. 1361.

S. 1359

This bill was prompted by the fear that the Soviet Union, which became an adherent to the Universal Copyright Convention effective May 27, 1973, may attempt to control the copyright that Soviet authors will have in the United States and other member countries of that Convention, in order to suppress publication abroad of the works of some of those authors. The general views of the Copyright Office on this bill are incorporated in the report by the Librarian of Congress to the Committee on the Judiciary dated April 23, 1973, to which your letter refers. Among other comments, the Librarian's report expressed the reservations we have about the specific provisions of S. 1359, particularly the limitation of transfers of ownership to the foreign author's "voluntary assigns."

Our reservations are two-fold. First, the limitation to "voluntary assigns" does not take into account those situations in which the laws of foreign countries may provide appropriately for transfers of copyright by operation of law. Examples would be transfers effected by law in bankruptcy proceedings and mortgage foreclosures. Second, it is doubtful that the phrase "voluntary assigns" would be effective to preclude the acquisition by agencies of the Soviet Government of an author's right of foreign publication. The agency may be able to obtain from the author, through various forms of coercion upon him, a document that purports to effect a voluntary assignment.

As we see it, a foreign country's internal methods of coercion are a political problem beyond the reach of our copyright statute. What might be achieved by the copyright statute is to deny any assertion by an agency of a foreign government of its ownership of rights in the United States by virtue of its seizure under its own law of an author's copyright. It would not be necesary to proscribe transfers by operations of law to persons other than government agencies. We therefore suggest that, instead of the language in S. 1359, consideration be given to a provision such as the following:

> "The expropriation, by a governmental organization of a foreign country, of a copyright or any right comprised in a copyright, or of any right in a work for which copyright may be secured, or the transfer of a copyright or of any such right from the author or proprietor to a governmental organiza-

> tion of a foreign country pursuant to any law, decree, regulation, order, or other action of the foreign government requiring such transfer, shall not be given effect for the purposes of this title."

As proposed in S. 1359, this provision could be inserted as a new subsection (d) to section 9 of the present statute. It could also be added to section 104 of S. 1361 as a new subsection (e).

PUBLIC DISPLAY OF WORKS OF ART; NOTICE REQUIREMENT

Your letter refers to an article in the Summer 1973 issue of Art News which suggests that the notice requirement in section 401 of S. 1361, coupled with the definition of "publication" in section 101, would place artists in a less favorable position than they have under the existing statute, particularly when original works of art are displayed publicly.

We consider it unnecessary to amend the definition of "publication" in S. 1361 in order to exclude the public display of an original work of art, as suggested in the article in Art News. In our view, the public display of an original work of art would not constitute publication of that work under the bill. "Publication" is defined in section 101 in terms that exclude public display of the single original "copy" of a work. Distribution of copies or the offering to distribute copies are the operative acts. The "offering to distribute copies . . . to a group of persons for purposes of further distribution, public performance, or public display" would constitute publication; this would cover, for example, the offering to supply copies of a motion picture to a number of theaters or broadcasters for public "performance" or "display." Public performance or public display itself would not constitute publication.

The concern on this point expressed in the artice in Art News appears to be founded on the supposition that the notice requirement in section 401(a) of S. 1361 might be held to apply to an original work of art when it is publicly displayed. To put to rest any such supposition, we suggest that the Committee report include a statement similar to the following one that appeared in House Report No. 83, 90th Congress, at pages 110–111:

> "Sections 401 and 402 set out the basic notice requirements of the bill, the former dealing with "copies from which the work can be visually perceived," and the latter covering "phonorecords" of a "sound recording." The notice requirements established by these parallel provisions apply only when copies or phonorecords of the work are "publicly distributed." No copyright notice would be required in connection with the public display of a copy by any means, including projectors, television, or cathode ray tubes connected with information storage and retrieval systems, or in connection with the public performance of a work by means of copies or phonorecords, whether in the presence of an audience or through television, radio, computer transmission, or any other process."

For further assurance, we suggest that the Committee report add, after the statement quoted above:

> It should be noted that, under the definition of "publication" in section 101, there would no longer be any basis for holding, as a few court decisions have done in the past, that the public display of a work of art under some conditions (e.g., without restriction against its reproduction) would constitute publication of the work. And, as indicated above, the public display of a work of art would not require that a copyright notice be placed on the copy displayed.

The article in Art News also proposes that the notice for works of art should consist only of the signature of the artist and the date of execution, and that the notice may appear on the front, back, base, frame or on any other readable part of the work.

The Copyright Office is aware that many artists fail to take advantage of the opportunity to secure copyright for their works, and do not comply with the notice requirements of the present copyright statute. The general revision bill incorporates liberalizing provisions that should enhance the opportunity of artists to claim copyright protection. For example, as already indicated, copyright would not be lost (as it may be in some cases under the present law) when an original work of art is placed on public display in galleries, museums, etc., without a copyright notice. Where the work is reproduced in copies that are publicly distributed, a copyright notice on those copies would still be required; but the provisions in sections 401–406 of the bill as to the notice requirement are much less stringent than in the present statute, with respect to both the position of the notice and the consequences of errors and omissions. The Register of Copyrights would be authorized to prescribe by regulation, as examples, specific positions of the notice on various types of works that would be adequate, and we have no doubt that the front, back, base, or frame of a work of art or other readable position would be acceptable.

We would not favor a notice consisting only of the signature of the artist and the date of execution. The symbol "©," the word "Copyright," or the abbreviation "Copr." constitutes an essential element in giving notice that copyright is claimed. In effect, to eliminate this element would be tantamount to eliminating the notice requirement. We see no valid reason for excluding published copies of works of art from the general notice requirement.

SECTION 112(C)

The Copyright Office agrees that the phrase "or of a sound recording" in section 112(c) of S. 1361 is unclear in scope and could be construed, as it stands, as including all sound recordings of any nature. We assume that the exemption in section 112(c) for the inclusion in certain transmission programs, under stated conditions of a performance of a nondramatic musical work of a religious nature, was intended to allow also the inclusion in those programs of a performance of a copyrighted sound recording of such a musical work. If this was the intention, we suggest the insertion, after the phrase "or of a sound recording," of the words "of such a musical work."

We see no need for an explicit definition in the bill of the term "transmitting organization" which appears in section 112(a) as well as in section 112(c). The term "transmit" with respect to a performance or display is defined in section 101; thus, paraphrasing that definition, a "transmitting organization" under section 112 (a) and (c) would be an organization that communicates a performance or display of a work by sending images or sounds from one place to another. It is important to note that section 112 (a) and (c) both relate only to "a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or transfer of the copyright." This limitation serves to define further the "transmitting organizaions" to which those sections refer.

We shall be glad to assist you further in any way you may wish.

Sincerely yours,

Abe A. Goldman,
Acting Register of Copyrights.

U.S. Senate,
Washington, D.C., August 1, 1973.

Hon. John L. McClellan
Chairman, Subcommittee on Patents, Trademarks and Copyrights,
Committee on Judiciary,
U.S. Senate,
Washington, D.C.

Dear John: I would appreciate it if you would make the enclosed statement part of the hearing record on S. 1361 which is currently under consideration by your subcommittee.

With best wishes.

Sincerely,

Alan Cranston.

Enclosure.

STATEMENT BY SENATOR ALAN CRANSTON ON S. 1361

I would like to commend the members of this committee for their hard work and persistence in undertaking a revision of the Copyright Law.

I am particularly interested in Section 111 of the bill, S. 1361, which concerns copyright fees connected with the carriage of television signals. There has been considerable debate and disagreement over the setting of fees paid by cable TV operators for material taken from distant commercial television signals and rebroadcast to cable subscribers.

I believe it is important that viable ground rules be established to deal with this complex issue, and I congratulate this committee for taking forthright action to try to resolve the matter in the new copyright bill. The establishment of a fixed fee schedule in the legislation is one approach to the problem. Perhaps the fees outlined in Section 111 are fair and realistic. I do not suggest that they are not.

But I do question whether sufficient study has been made of appropriate fee levels to be certain that those contained in the bill are the fairest and most equitable for all parties.

I would feel better able to speak to this point if hearings had been held on fee levels. Without the benefit of such hearings, I question whether the copyright bill should mandate specific fees to be paid to copyright holders.

I understand that intensive efforts and long hours of exchange and discussion took place in 1971 between all interested parties in this matter—the motion picture industry, the commercial broadcasting industry, and the cable TV association. With the assistance of the Chairman of the Federal Communications Commission and the Director of the President's Office of Telecommunications Policy, these parties agreed to a so-called Consensus Agreement. Due to the difficulty and complexity involved in arriving at mutually acceptable copyright rates, the Consensus Agreement provided for compulsory arbitration on the matter of fees if the parties were not able to reach agreement on their own.

It seems to me this approach to fee setting would be a fair and reasonable approach. Compulsory arbitration has no built-in advantages for either side—the copyright holders or the users. An Arbitration Tribunal, composed of experts without bias, would seem to me to afford the best chance for arriving at a fair and reasonable settlement of this complex, difficult problem.

Assurance of a reasonable rate of return for the producers of copyrighted material is of particular interest to me. The holders of copyrights and producers of copyright material represent the creative elements in our society who through their talents and labors make available to the public artistic and educational programs. They are entitled to a realistic schedule of copyright fees.

But even more important than reward is encouragement for them to produce more and better.

The motion picture industry in California makes a significant contribution to the entertainment of our nation. Cable television is likely to be an extremely influential and important segment of the broadcast media in the years ahead. The ground rules set by this copyright legislation will undoubtedly have a lasting influence on both these industries.

I urge my colleagues to examine carefully in the course of these hearings whether the prescribed fee schedule for copyright material in Section 111 is the wisest course for Congress to follow.

FEDERAL LIBRARIANS ASSOCIATION,
Washington, D.C.

STATEMENT OF THE FEDERAL LIBRARIANS ASSOCIATION TO THE SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY ON S. 1361

The Federal Librarians Association is a fledgling organization of professional employees in library, information and documentation centers of the United States government. Membership embraces librarians from Okinawa to Germany, as well as those in the continental United States.

The purpose of the organization is to provide a forum for the exchange of ideas and techniques in the library sciences as they are exercised in Federal agencies, and to provide mutual cooperation and support between these libraries with a common goal—to serve the United States government by providing the best possible library, information and documentation service to the general public.

The issue of library photocopying is a concern that this organization shares with others, and a common desire that justice and equity prevail. We are well aware that legislative drafting, especially in this field, is a difficult and often inconclusive art. Nonetheless, we believe that revision is necessary in the two subissues to which you have addressed yourselves, viz. what constitutes fair use, and the liability of the librarian and the user in ascertaining the requirements for making single copies.

We, the Board of Directors and the Executive Committee of the Federal Librarians Association, meeting in Alexandria, Virginia, on August 6, 1973, unanimously agreed that the language of sec. 107 in S. 1361 is necessary in the public interest, and provides statutory support to what "bench law" has often decided, viz. that the primary purpose of copyright legislation is "to promote the progress of Science and the useful Arts".

In regard to section 108(d) we endorse without reservation the amendment recommended by the American Library Association in their statement presented to you in the hearings on July 31, 1973, a copy of which is attached. We are happy to join our colleagues in the American Library Association in this recommendation which will not only protect librarians from undue and unjust liability, but also permit them to advance the public interest and to satisfy the national need for intellectual and scientific information.

STANLEY J. BOUGAS,
President, Federal Librarians Association.

STATEMENT OF EVAN H. FOREMAN, JUNE 15, 1973

I appreciate the opportunity of presenting testimony to this Subcommittee on Senate Bill 1361, designated a General Revision of the Copyright Law of the United States. Although I own several dozen copyrights on forms used in connection with a small family business, I oppose this bill on the grounds that it drastically and unfairly extends the rights of copyright holders to the detriment of the public.

As I understand this bill, the concept of publication, which under the present copyright law marks the beginning of the term of statutory copyright, would be abolished. The term of copyright would commence with the date of creation of the work and would last for a term measured by the life of the author plus fifty years in the case of individuals, and seventy-five to one hundred years from the date of creation for corporate copyright owners. (Sec. 302a S. 1361)

The Constitution, Article I, Section 8, Clause 8, provides that Congress shall have the power "to promote the progress of science and the useful arts by securing for *limited times* to authors and inventors the exclusive rights to their respective writings and discoveries" (Emphasis supplied). This clause, which forms the Constitutional basis for all copyright legislation, was intended by the framers of the Constitution to benefit the public by encouraging invention and artistic expression through the grant of a *limited* monopoly.

Prior to the passage of the current act, the term of protection for published works was fourteen years, with a renewal period of an additional fourteen years. The current law doubled this period so that now copyright owners may claim two twenty-eight year periods of protection. As you know, Congress has, for some years, extended this protection so that works which would have otherwise fallen into the public domain remain copyrighted. Now, advocates for copyright industries, in seeking passage of S. 1316, argue that even fifty-six years is not sufficient time in which to exploit their works. These arguments are not only contradicted by the facts, but they are also offered in support of legislation which would work a grave injustice on the public.

Movies, songs, books and other copyrighted works reap the greatest financial benefits for their creators during the first year or so of their existence. After that, the pecuniary returns fall off drastically. The same copyright industries which seek to persuade Congress that a half century is too brief a period in which to exploit songs, movies, books and other copyrighted works have, however, successfully argued just the converse to the tax collector in securing for themselves the fastest possible depreciation write-off on their copyrighted properties. They have successfully convinced the tax collector that their work is more than ninety percent exploited within the first three years of its life.[1] Their contention therefore, that a half century is not enough to enjoy the financial rewards of their creation is contradicted by their own successful arguments to the Internal Revenue Service.

No proponent of this bill can convincingly contend that the public would benefit from further extension of the copyright holders' period of protection. To be sure, authors, composers and other creative persons must be given sufficient motivation to produce works which will enrich society's cultural pool. But it is only this benefit to the public which justifies the limited monopoly of copyright. The inclusion or extension of any rights in copyright which do not ultimately benefit the public is contrary to Constitutional intent in that it unduly rewards copyright owners at the public's expense. I therefore urge the Subcommittee to retain the present term of copyright, with the same renewal period, and bring to an end the temporary extensions which have heretofore been granted, and allow these many works, which are long past due, to fall properly into the public domain.

It is also suggested by copyright industry advocates, with equal vigor, that we should do away with the concept of publication, and have the period of copyright commence, not with the date of publication, but with the date of creation of the work. It is argued that the concept of publication is outmoded and no longer serves a useful purpose. A logical analysis of the function of publication demononstrates that just the contrary is the case.

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[1] Daily Variety, May 15, 1972, Pages 1 & 14, Exhibit 1

Presently a work must be published with proper notice to establish copyright protection. It is this publication which perfects the copyright—not the registration of one's claim of copyright with the Copyright Office, which must come *after* publication. The present act nowhere defines publication but Section twenty-six refers to the date of publication as the "earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed . . ." While this is not necessarily a literal definition of publication, it amply conveys the true meaning of publication; i.e., a dedication to the public. But, the proposed bill, S. 1361, by abolishing the requirement of publication, would mean that one could secure the protection of a statutory copyright without ever making his work public or without ever placing tangible copies in the hands of the public. Under such a system the copyright owner could reap the benefits of the copyright law but deprive the public of the eventual free and unfettered use of the copyrighted work. Where tangible copies of the work are sold to the public, as is the case now with most books and magazines, there is no danger. But, all too frequently, as in the case of motion pictures, the works are not usually sold to the public, but are merely shown temporarily and then recalled permanently by the owner. However profitable this may be, the actual and practical effect is to render the term "for limited times" a nullity, because without publication (meaning the sale of tangible copies to the public), at the end of the statutory period, the copyright would continue in perpetuity, since only the copyright owner would have lawful possession of any of the tangible copies. The intent of such copyright owners is amply demonstrated by a statment of Mr. E. Cardon Walker, President of Walt Disney Productions, quoted in the newspaper supplement "Parade," March 18, 1973, page 4, "A large share of our product is timeless, which means that we can re-release our pictures generation by generation." [2] This industry practice does violence to the Constitutional mandate that copyrights shall be "for limited times" by insuring that "Snow White and the Seven Dwarfs" will never fall into the public domain and that our great-grandchildren, and theirs as well, will perpetually be paying Mr. Walker's stockholders to enjoy it.

Unless Congress enacts a law requiring publication and defines it as the distribution of tangible copies of the work to the public, like books and magazines, I submit that S. 1361 would be unconstitutional since the public would be denied its remainder interest in the copyrighted works. Without the requirement that tangible copies be distributed in order to perfect one's copyright, large copyright owners will continue to band together, file repressive lawsuits against private, individual citizens, claiming that their copyrighted products are never distributed to the public and ask for seizure of the copyrighted item.[3] This would allow such a group to maintain perpetual and absolute control of copyrighted items. This is not what the Constitution intended and should not be sanctioned by Congress.

The above is not hypothetical. It is a reality under the present law, and the proposed law goes even further in extending protection to copyright owners. Under the present law the major motion picture companies, for example, have exercised almost complete control over nearly all their films in the United States. Through a small law firm on retainer to all the major U.S. film distributors, the motion picture industry has repeatedly threatened numerous film collectors with lawsuits in an attempt to discourage their collecting films. Through this same firm the industry has initiated extraordinary lawsuits against numerous others involving seizure without notice of the collectors' film prints and issuance of Temporary Restraining Orders. The effect of these actions has been to deny many citizens their property and because the defendants in such lawsuits are usually selected to be middle income film collectors, they are unable to compete with these corporations on an equal financial footing.

No matter how economically profitable it may be from the viewpoint of large corporate copyright holders, not to sell, but only "license for use" their copyrighted products, the unalterable result of such a method is to render *perpetual* control over the copyrighted item. This cannot be squared with the "for limited times" language of the Constitution. The history of motion pictures under the present law provides an example. While theoretically, under the present law, the fruit of the tree drops into the public domain at the termination of the statutory period to enrich the cultural pool of the public, this has not, in fact, happened. The majority of motion pictures created in the United States have disappeared altogether, many prior to the expiration of even the first twenty-eight year term of protection. The public has forever been deprived of this part of its cultural heritage which its ticket purchases have financed and the Constitution has held is its due. This harm is irreparable. Such works cannot and do not fall into the public domain because not a single tangible copy remains in existence.[4] Copyright here has become a chess game in which the public is permanently checkmated.

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[2] Exhibit 2.

[3] Memorandum Statement by the Copyright Committee of the Motion Picture Association of America, Inc. at page 1001, Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, First Session, 89th Congress, Copyright Law Revision, Serial No. 8, Part 2, Exhibit 3.

For the foregoing reasons I respectfully urge that no legislation be approved by this Subcommittee or by Congress which lengthens the term of statutory copyright, or which fails to make publication, defined as the sale of tangible copies to the public, a specific requirement to perfecting copyright protection.

(Note: The Exhibits referred to by Mr. Foreman are in the files of the Committee.)

August 7, 1973.

Statement by Morton I. Grossman, VA Wadsworth Hospital Center, Los Angeles, Calif.

I am Morton I. Grossman, MD, PhD, Senior Medical Investigator, Veterans Administration Wadsworth Hospital Center, Los Angeles; Professor of Medicine and Physiology, UCLA School of Medicine, Los Angeles; former president of the American Gastroenterological Association; former member of the editorial boards of American Journal of Physiology, Gastroenterology, Handbook of Physiology, UCLA Forum in Medical Sciences, and others; currently Chairman of the Editorial Board of the official journal of the American Gastroenterological Association, Gastroenterology.

I appreciate this opportunity to present my view of the copyright bill, S. 1361, and request that this statement be made part of the official record. I speak as a private individual, not as a representative for any of the organizations listed above.

Any new provision of the copyright law that impaired the ability of individual scientists to obtain copies of individual articles published in scientific journals would be a serious impediment to the flow of information that is essential for scientific progress.

I oppose any plan that would require the payment of royalties for photocopying individual articles in scientific journals. Such royalties cannot be viewed in the same light as royalties on literature for the writing of which the author earns part or all of his living. Scientists are not paid a fee for publishing their results in scientific journals. No fee should be charged for making individual copies of such articles. Copyright privileges in the case of scientific journals should be used only to safeguard against unethical use, not as a means of providing income to publishers or scientific societies.

The proposal by the American Library Association to substitute section 108 (d) (1) of the present Bill with this new wording:

"The library or archives shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or phonorecord of a similarly small part of any other copyrighted work."

would accomplish the purposes I have set forth.

Respectfully submitted.

Supplemental Statement of Bella L. Linden, on General Revision of the U.S. Copyright Act, Submitted on Behalf of Harcourt Brace Jovanovich, Inc., and MacMillan, Inc.

The particular impetus for this Supplemental Statement is the inquiry made by Senator Burdick into precisely how libraries can be expected to record and transmit compensation for numerous individual photocopying uses, and his request for a description of the administrative techniques and budgets which would be involved. Accordingly, this submission will be directed towards the issue of compensation for library photocopying. Insofar as compensation for the use of copyrighted materials in information storage and retrieval systems is concerned, most technologists seem to agree that there is no significant administrative or financial burden in programming computer systems to identify and record the various works stored, manipulated and retrieved. The current issues with respect to use of copyrighted materials in information storage and retrieval systems do not appear to be those of the mechanism of compensation, but rather the points at which the obligation of compensation should attach—i.e. at input, during manipulation, or upon retrieval—and whether a rate making authority, such as that discussed in connection with CATV, should be created. We believe these are issues best suited to consideration by the proposed National Commission on New Technological Uses of Copyrighted Works.

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[4] Films In Review, April, 1973, at page 224, Exhibit 4.

With respect to library photocopying, it appeared to me that the hearings on July 31st revealed a general agreement among the parties and the Members of the Subcommittee that library photocopying can be a valuable research tool which should not be prevented, but that copyright proprietors are entitled to a fair compensation for such use of their works. The library representatives, however, appear to take the position that although copyright proprietors are entitled to such compensation the presence of an obligation to pay such compensation will involve unbearable administrative burdens of identifying and recording uses. Their objection, in sum, appears not to compensation per se, but rather to the manner in which it could be provided.

Among the mechanisms of compensation for library photocopying which have been discussed are blanket licenses, subscription fee increments, clearing houses, per-use charges to requesting users, and others. Several, but not all, of these devices would admittedly involve "clocking" of individual uses. However the photocopying devices used by libraries today generally do record the number of pages copies and in many cases hardware manufacturers receive payment from libraries based upon such clocked uses. There is little doubt that any photocopying equipment can be adapted to use with similar clocking devices at nominal costs. Obviously, compensation schemes which will depend upon the number of pages copied by individual users will involve questions of identifying and segregating public domain and copyrighted materials. Similarly (and regardless of the particular compensation scheme envisaged) not all objects of photocopying must or should be treated in the same manner. Thus the copying of technical journals, of single encyclopedia entries, of text books, or of novels, poetry or music involve varying considerations and hence potentially varying forms and amounts of compensation. However these are problems which, again, the copyright proprietors themselves will have to resolve—and they will quite clearly be forced to resolve them in a manner which will assure a workable recordation and transmission of the compensation which they have stated they require in order to survive.

To attempt to calculate specific budgets for the implementation of various compensation systems at this time is a rather fruitless task. Any realistic estimate of the amounts which would be involved will depend not only upon the particular system—such as blanket licensing or per-use charges—but would require clearly defined samplings of the current practices of libraries, their photocopying procedures, and the nature of the copied works.

In all of American commerce the establishment of devices for payment of obligations has always been a problem of the entity to whom the obligation is owed, provided however that the law recognizes the product or service as private property and precludes preemption without the authorization of the owner. So too in connection with library photocopying the creation of workable devices for compensation is a problem which will have to be faced by those copyright proprietors who desire compensation. If their proposals and devices prove unworkable, the pressures of the marketplace will provide appropriate adjustments.

It is submitted that there is no justification for vitiating the authors and publishers rights by including the librarians' proposed Sec. 108 in the Revision Bill. It is respectfully urged that Sec. 108 of the Act as passed by the House plus leaving the unresolved issues to the National Commission proposed under Title II of the Bill would be an appropriate alternative in the event this Subcommittee considers that the appropriate adjustment between users and proprietors cannot be left to the marketplace.

DETROIT PUBLIC LIBRARY,
Detroit, Mich., August 6, 1973.

Hon. PHILIP A. HART,
U.S. Senate,
Senate Office Building,
Washington, D.C.

DEAR SENATOR HART: I am wriing to you in your capacity as a member of the Subcommittee on Patents, Trademarks and Copyrights—Senate Committee on the Judiciary, and asking if this letter can be placed in the record on Senate Bill 1361 (the copyright revision bill), Section 108(d), Photocopying for Libraries.

At a hearing held July 31, 1973, Senator McClellan proposed that the record be held open until the 10th of August so that additional testimony could be given concerning the amendment proposed by the American Library Association. I am writing in support of that amendment, that libraries need more protection under the provisions than "fair use." The bill should specifically state that libraries are free to make single copies to aid in teaching, research, and particularly in interlibrary loan. This act should be permissible and not subject to possible suit on behalf of the public good.

Thank you for your help in making this endorsement part of the record. The Detroit Public Library and its Commission feel strongly that this protection is essential in order to continue quality library service.

Sincerely yours,

MILDRED M. JEFFREY,
Member, Detroit Library Commission.

INFORMATION INDUSTRY ASSOCIATION,
Bethesda, Md., August 10, 1973.

Senator JOHN L. MCCLELLAN,
U.S. Senate,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR MCCLELLAN: We are pleased ot submit this letter as a supplemental statement on the Copyright Revision Bill, S. 1361.

We respectfully urge that the library and education exemption proposals be referred to the National Commission on New Technological Uses of Copyrighted Works to be established by Title II of the Bill. These exemptions raise serious and far-reaching queestions bearing directly on the ability of the copyright laws to fulfill its original constitutionally mandated purposes in informaton technology areas.

The proponents failed to provide any supporting economic data as to the impact of the proposed exemptions on suppliers of information and publications. The proponents failed completely to establish a sound case for their proposals.

The information industry is the only industry with any significant experience in the day-to-day business of creating and supplying information services of the kind libraries and schools would be in position to perform free of copyright if the exemptions were to be adopted. Great private resources are being applied to obtaining permission to use copyrighted materials, to account for their use and to fulfill user needs in creative and meaningful ways. It is the burden of the proponents of the exemptions to demonstrate by economic data that these efforts would not be damaged by their proposals.

They have failed to do so.

We believe this failure is a logical extension of two factors:

(1) The information industry is new and has grown up in the years since the Senate, in 1967, first passed legislation to create the National Commission. The Information Industry Association came into existence in 1969.

(2) The Library exemption proposal has been resurrected from a much earlier phase of the copyright revision effort and it is patently clear no effort has been made to accommodate its language to the fact of the new information technology applications and capabilities represented by information industry activities.

We believe this industry offers the most stimulating, creative and economically productive means for harnessing the new technologies to the dissemination of information and for the fulfillment of the purposes of the copyright law. There is no question that the effect of the proposed exemptions, together or separately, would be to destroy the economic foundations of this industry.

We recognize that that is not the intent of the exemption proposal. But that nonetheless would be the result.

The development of the full potential of information technologies to store, search, find and deliver the precise information you want, when you want it, where you want it and in the form you want it is a costly and complex effort. The effort has only been started.

Private risk capital is being devoted to developing and refining information services designed to deliver just the single copy desired. Granting exemptions to provide alternative sources for similar services free of copyright would not only construct and eliminate opportunities for the industry, but it would also deny the people of the United States the benefit of the innovations in products, services and systems currently being funded by private risk capital.

It should be noted that no evidence was submitted as to the financial or other capabilities of publicly funded schools and libraries to perform these costly and sophisticated activities in place of the efforts currently being made with private risk capital.

In this phase of technological development affecting the information service structure of the nation, the single copy and free-input exemption proposals far transcend the claim that they merely codify "Fair Use" in library and educational settings.

Section 107 of the bill restates the fair use doctrine and provides guidance for individual users in schools and libraries. It is far better that there be some uncertainty about occasional individual uses that come close to the line in exceeding the known boundaries of fair use, than that the creative and economic resources devoted to developing economically sound information services for all aspects of our society be undercut and eliminated. No broadening of the fair use concept should be undertaken until the role of industry in this process is understood and taken into account.

The appropriate mechanism for resolving the new technology questions raised by the exemption proposals is to refer both to the National Commission. They clearly fall within the jurisdiction and purposes of that Commission. The experience and existence of the information industry underscore the wisdom of establishing the Commission and the need to develop further information and economic data prior to legislation on these proposals. If necessary, the mandate to the Commission might be so defined as to ensure that these matters receive priority consideration.

Without supporting economic data on which to evaluate their effect and on which to base a sound decision as to their effect on the operations of the copyright law of the United States, there is no basis for the enactment of these far-reaching proposals.

Thank you for this opportunity to share our perspectives with you.

Sincerely,

PAUL G. ZURKOWSKI,
President.

THE JOURNAL OF INVESTIGATIVE DERMATOLOGY,
Boston, Mass., July 19, 1973.

Hon. JOHN MCCLELLAN,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MCCLELLAN: It has come to my attention that the Copyright Revision Bill will in the near future be considered by your Subcommittee on Patents, Trademarks and Copyrights. As the editor of a limited subscription, highly specialized medical journal I would like to express some thoughts concerning this bill.

Evidence has been developed, particularly by the Williams and Wilkins Company, that the increasing use of photocopying has led to a definite decrease in subscriptions to journals such as ours. I have examined this evidence and believe it to be valid. My basic feeling is that the cost of production of materials such as that which we publish should be spread as broadly as possible among the users of the material. For that reason, I feel it imperative that the new copyright bill be written in such a way that some royalty for use of the material can be returned to those who take primary responsibility for publication of the material. If this is not done, it is my belief that in the relatively near future we will see either the demise of journals such as ours or the need for very substantial governmental intervention so that type of medical information will not disappear. The simplest way seems to be to write the new copyright bill in such a way that the cost of production can be equitably spread.

It is my hope that you will bring these views before the members of your subcommittee. I will be very happy to give you any further help in this matter.

Sincerely,

IRWIN M. FREEDBERG, M.D.

U.S. SENATE,
OFFICE OF THE MAJORITY LEADER,
Washington, D.C., July 24, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyright, U.S. Senate.

DEAR MR. CHAIRMAN: Enclosed is a detailed letter and attachments I have received from Earl Morgenroth of the Rocky Mountain Broadcasters Association, Missoula, Montana, discussing the copyright bill now pending before your subcommittee.

Mr. Morgenroth is presenting the views of the small market broadcasters and I would appreciate any consideration that can be given to the contents of the enclosed correspondence.

Thanking you, and with best personal wishes, I am

Sincerely yours,

Enclosures.

MIKE MANSFIELD.

ROCKY MOUNTAIN BROADCASTERS ASSOCIATION,
Missoula, Mont., July 9, 1973.

Hon. MIKE MANSFIELD,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MANSFIELD: On my last trip to Washington, D. C., I discussed with you the Copyright Bill currently in the McClellan Committee, and the CATV Broadcaster Compromise (Consumer Agreement). Attached please find the CATV Broadcast Compromise which was drafted two years ago but never implemented. It is a good agreement in part, but provides virtually no protection for the small market broadcaster.

Any CATV copyright legislation adopted by Congress should include the following modifications of the "Compromise" in order to protect small market broadcasters:

1. Local Signal definition should remain the same as the current FCC Definition.

2. Television stations not in the top 100 markets must be extended the same syndicated programming protection as the compromise agreement gives to the second 50 television markets.

3. On leapfrogging, the language of B of the compromise agreement is okay, but the language of A should be changed to provide that on network signal importation, the closest such signal must be carried in all markets.

4. On Copyright Legislation, in B of the Compromise Agreement, the less than 3,500 subscriber exemption for existing independently owned CATV systems should be changed to a less than 500 subscriber exemption for such systems.

5. The Grandfathering provisions of the Compromise Agreement should be entirely deleted, with no Grandfathering exemption on Copyright liability provided to cable systems.

6. The Radio Carriage provision of the Compromise Agreement should be deleted, and replaced with a total ban on CATV carriage of AM or FM station signals.

Under the heading "Radio Carriage," all aural signals including Muzak type signals and other taped music (without visual material) should be banned from CATV. CATV should be restricted to visual transmission.

There is neither need nor justification for CATV aural-only transmission. In fact, under the "One-to-a-Market" rule of the FCC, an owner of a radio station in one market is prevented from owning a television station in the same market and vice versa. In addition, most small markets are adequately served by aural signals (AM and FM). If CATV Systems are allowed aural origination, it would severely limit the expansion of radio services in small market communities and in some cases, jeopardize existing service.

Our position is that CATV Systems should not be allowed to carry AM or FM broadcasts or other aural only signals. CATV was originally conceived to expand television service and it should be limited to transmission of television.

In regards to leapfrogging (bringing in distant signals by microwave) it should be limited to current FCC rules which state that a CATV system may carry the three network signals plus one independent and one educational station in small markets as well as live originations. Leapfrogging should be limited to the closest network affiliates and independent stations.

In addition to the Compromise, I am submitting several pages of background material which does not necessarily represent the small market position, but will provide additional information concerning the Compromise (Consensus Agreement).

We need your help in getting a new Copyright Bill through Congress including Copyright legislation for cable systems that protects the small market free broadcasters of Montana and the Rocky Mountain West.

Sincerely,

EARL E. MORGENROTH,
President.

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., June 6, 1973.

MEMORANDUM

To: Board of Directors.
From: John B. Summers.
Subject: **CATV and Pay–TV.**

I. COPYRIGHT

A. CBS v. Teleprompter

The U.S. Court of Appeals for the Second Circuit ruled on March 8, 1973 that "when a CATV system imports distant signals it is no longer within the ambit of the *Fortnightly* doctrine, and there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it." The effect of this decision is to render CATV systems fully liable under copyright law for the performance of programs carried via distant signals. It also placed the Supreme Court's 1968 Fortnightly decision in proper perspective, i.e., that the copyright exemption afforded cable systems by that case only applied to acceptable signals received off the air by a CATV antenna "adjacent to the CATV community." The Court of Appeals decision overruled an earlier District Court ruling which would have exempted all CATV carriage of TV signals from copyright liability.

Teleprompter, on June 5, 1973, asked the Supreme Court to review the Appeals Court's decision. Presumably, if the Supreme Court denies review or upholds the Appeals Court decision, the case will be remanded to the District Court for a determination of damages.

The *CBS v. Teleprompter* case has given broadcasters and copyright owners the upper hand in dealing with cable on copyright and this factor should weigh heavily in the legislative arena.

B. FCC role in CATV copyright question

The CATV rules adopted by the FCC in February 1972 presuppose the enactment of copyright legislation which would call for the payment of fees by CATV systems for the use of copyrighted television programs. (See Government Relations Department memo for a discussion of the status of copyright legislation.) If copyright legislation is not forthcoming in the immediate future, the Commission's CATV rules would no longer be defensible as a balancing of the equities between cable and broadcast interest. In this regard, Chairman Burch stated in Senate testimony early this year that if copyright legislation is not forthcoming, the CATV rules will have to be revisited.

II. PAY-CABLECASTING—DOCKET NO. 19554

As part of the reconsideration of its cable actions in Docket No. 18397, the Commission, on July 24, 1972, instituted a new rule making proceeding to review the existing anti-siphoning rules applicable to cablecasting for which per program or per channel charges are made. The existing rules are essentially the same as those applicable to over-the-air pay-TV (STV).

In comments filed on November 1, 1972, NAB emphasized the proliferation of pay-TV via cablecasting and closed circuit arrangements. We urged the FCC to insure that pay cable serves as an outlet for new and diverse programming and does not become a vehicle for siphoning off programming now seen on free TV. Vigorous opposition to the existing pay-cable rules was raised, particularly by NCTA, the Justice Department and the program suppliers. In reply comments, NAB supported the FCC's jurisdiction to adopt anti-siphoning rules and countered the First Amendment arguments and other alleged obstacles to the imposition of pay-cable restrictions which had been advanced by the opposition.

An FCC decision in this docket could be close at hand.

III. TRANSMISSION OF PROGRAM MATERIAL TO HOTELS AND SIMILAR LOCATIONS—DOCKET NO. 19671

On January 24, 1973, the Commission initiated a broad inquiry and rulemaking proceeding concerning the competitive relationships between various methods of transmitting program material to hotels and existing broadcast and cable services. Additionally, the Commission noted its concern about similar transmissions to non-transient locations, such as homes and apartments. Essentially the proceeding covers all new forms of pay-TV, other than cable and STV.

NAB filed Comments on May 21, 1973. We pointed out that hotel pay television already is in operation nationwide and that widespread home service would soon follow thereby posing a direct and immediate siphoning threat to free broadcast television. We urged the Commission to adopt antisiphoning rules applicable to all methods of closed-circuit transmission (e.g., common carrier, MDS, Business Radio Service) which provide pay-TV to homes and other non-transient dwelling places, thus preserving free television as a vital and viable public service.

Reply comments are due July 23, 1973.

IV. PROPOSED SPORTS BLACKOUT RULE—DOCKET NO. 19417

Together with its February 2, 1972 cable actions, the FCC issued a Notice of Proposed Rule Making to deal with the sports blackout question. The proposal would generally prohibit systems within the Grade B contour of a TV station located within the home city of a professional baseball, basketball, football or hockey team from carrying a TV broadcast of the same sport when the local team is playing at home. In comments filed on March 16, 1972, NAB supported this proposal and urged that it be extended to cover intercollegiate and scholastic events as well as professional contests. We also asked the FCC to address itself to the even more important question of the effect of unrestricted CATV importation of sports contests upon the ability of local stations to obtain revenues substantial enough to support the broadcasts of the home or away games of a local team engaged in the same sport. These points were stressed further in oral argument held last August.

While no decison has been issued in this docket, the FCC removed a measure of the prevailing inequity by ruling last December that a CATV system in the West Palm Beach, Florida market could not "import a distant network television station not normally carried on the system, which is broadcasting a professional sports program that is being blacked out, pursuant to a league-network contract, on network stations normally carried on the cable system."

V. PROPOSED CABLE/RADIO RULES—DOCKET NO. 19418

Concurrently with the issuance of its new cable rules in February 1972, the FCC issued a Notice of Proposed Rule Making looking toward adoption of rules governing CATV carriage of radio signals. The Commission cited the following CATV/radio provision of the consensus agreement as a focus for comments:

"When a CATV system carries a signal from an AM or FM radio station licensed to a community beyond a 35 mile radius of the system, it must, on request carry the signals of all local AM or FM stations respectively."

Additionally, they suggested a rule providing that whenever a local signal is carried, all signals of the same type must be carried. All comments and reply comments have been on file since early last summer and this matter should be ripe for decision.

Pending final action in this proceeding the FCC will not authorize new CATV service which would bring distant radio signals (1) into comunities of less than 50,000 having licensed radio stations or (2) into any community unless all local stations of the same type (AM or FM) are also carried. For purposes of this interim procedure, a distant signal is one licensed to a community more than 75 miles from the cable community.

FISHER, WAYLAND, SOUTHMAYD AND COOPER,
Washington, D.C., June 19, 1973.

Mr. EARL E. MORGENROTH,
President, Rocky Mountain Broadcasters Association,
c/o Station KGVO-TV
Missoula, Mont.

DEAR EARL: This will acknowledge receipt of your letter of June 8 requesting that I compile an RMBA position statement on FM translators, complete the RMBA comments on ascertainment of community needs in Docket 19715, request reconsideration in the license renewal proceeding in Docket 19153, and push the Commission to adopt a decision in the CATV radio signal rule making in Docket 19418.

I have obtained from the Commission the text of its attached proposed bill, to amend Section 318 of the Communications Act with regard to translators, and the Commission statement to Congress in justification of this proposed bill. Also, I have obtained the attached text of H.R. 5369 introduced in the House of Representatives on March 7, 1973 by Harley Staggers, the Chairman of its Committee on Interstate and Foreign Commerce, and the attached text of S. 1229 introduced in the Senate on March 14, 1973 by Warren Magnuson, the Chairman of its Committee on Commerce. I will complete and forward to you my draft of a position statement for RMBA within the next few days.

As I advised in our conference phone conversation, the date for the submission of comments in Docket 19715 on ascertainment of community needs has been extended to August 1. I will complete and forward to you well in advance of that date the RMBA comments in this Docket.

Although the Commission on May 4 announced adoption of its new license renewal requirements in Docket 19153, it stated that the document would not be published in the Federal Register until the Annual Programming Report and Section IV-B of Form 303 are cleared by the Office of Management and Budget; that the Rules will be effective 30 days after Federal Register publication; and that the time for filing Petitions for Reconsideration will also run from the date of such Federal Register publication. As yet, this publication has not occurred because the White House Office of Management and Budget has not yet cleared the new forms. It may be some time yet before the forms are cleared because there is current discussion about some revision in the forms. As a result, we will have ample time to complete and file the RMBA request for reconsideration of the new announcement requirements as set forth in the May 1 Interim Report and Order in Docket 19153.

Recently I discussed with Al Cordon, the Assistant Chief of the Cable Television Bureau, the status of the ratio signal importation rule making in Docket 19418. He advised that the matter is presently on dead center, and that it has a low priority among the numerous issues on cable television which await Commission decision. He said, for instance, that such issues as CATV multiple ownership and pay CATV have higher priority insofar as both his staff and the Commission are concerned. I have concluded from this and from other recent contacts at the Commission that if our push for action in Docket 19418 is to succeed, it will have to be directed to the Commission via your influential friends on Capitol Hill rather than by a direct RMBA approach to the Commission. The present low priority of Docket 19418 will not likely be changed without a lot of urging from the Hill. This I think could be most effectively initiated by the RMBA membership out there rather than by me here.

With kindest personal regards and best wishes, I remain

Sincerely yours,

JOHN P. SOUTHMAYD.

[H.R. 5369, 93d Cong., first sess.]

A BILL To amend section 318 of the Communications Act of 1934, as amended, to enable the Federal Communications Commission to authorize translator broadcast stations to radio translator stations to operate unattended in the same manner as is now peroriginate limited amounts of local programing, and to authorize frequency modulation radio translator stations to operate unattended in the same manner as is now permitted for television broadcast translator stations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause (3) of the first proviso of section 318 of the Communications Act of 1934 (47 U.S.C. 318) is amended—

(1) by striking out "solely" and inserting in lieu thereof "primarily", and
(2) by striking out "television".

[S. 1229, 93d Cong., first sess.]

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PROPOSED BY THE FCC FOR THE 93RD CONGRESS

A BILL To amend section 318 of the Communications Act of 1934, as amended, to enable the Federal Communications Commission to authorize translator broadcast stations to originate limited amounts of local programming, and to authorize FM radio translator stations to operate unattended in the same manner as is now permitted for television broadcast translator stations

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(1) by striking out "solely" and inserting in lieu thereof "primarily", and
(2) by striking out "television".

EXPLANATION OF PROPOSED AMENDMENT TO SECTION 318 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED, TO ENABLE THE COMMISSION TO AUTHORIZE TRANSLATOR BROADCAST STATIONS TO ORIGINATE LIMITED AMOUNTS OF LOCAL PROGRAMMING, AND TO AUTHORIZE FM RADIO TRANSLATOR STATIONS TO OPERATE UNATTENDED IN THE SAME MANNER AS IS NOW PERMITTED FOR TELEVISION BROADCAST TRANSLATOR STATIONS

Translator stations are low-power broadcasting stations which receive the incoming signals of a television or FM radio station, amplify the incoming signals, convert—or "translate"—them to a different output frequency and retransmit the signals to the community or area which it is desired to serve. Translators are needed in certain areas of the country where because of terrain or extreme distances, it is not possible to receive directly the signals of the originating television or FM radio station. They were conceived as simple, inexpensive devices which could be made available to small communities where the demand for television or FM radio service was great and financial resources were meager. In such areas, translators frequently provide local residents with their only source of television or FM radio reception.

Section 318 of the Communications Act of 1934, as amended, 47 U.S.C. § 318, (clause (3) of the first proviso), limits translators to rebroadcasting the signals of their primary stations without any significant alteration of the characteristics of the incoming signals. Although the Commission has interpreted Section 318 to allow UHF television translators to broadcast twenty seconds of commercial advertising per hour, the origination is restricted to slide announcements, and no program origination is permitted. Consequently, translator stations are not self-supporting and must depend on public generosity for their support. In addition, Section 318's prohibition of program origination in many instances deprives those people dependent on translator stations for their television or FM radio reception of news of local political interest or events which vitally affect them. We believe the proposal's substitution of the word "primarily" for "soley" will the Commisison to authorize limited amounts of local origination in keeping with the public interest.

We recognize the proposal does not set any specific limitations as to the amount of local origination to be permitted. We believe, however, that such a limitation could be best determined in a rulemaking proceeding conducted by the Commission to implement this legislation during which the comments received from all interested parties could be analyzed and evaluated. In deciding upon such a limitation the Commission would, of course, be bound by the requirement of Section 318 that origination be limited to the extent necessary to insure that translator stations retain their primary characteristics as rebroadcast stations.

It should be noted that cable television interests have expressed their concern to the Commission with respect to what effect our proposal might have on the relationship of translators and cable systems. Cable operators expressed particular concern with regard to possible interference between VHF television translator stations (those operating on output channels 2 through 13) and cable television systems when broadcast channels are authorized for translator use. We cannot perceive that this proposal would have any effect whatsoever on the matter of electrical interference as it would merely enable the Commission to promulgate rules to authorize program origination by translators. This would have no effect on the frequencies on which translators operate. In any event, if the proposal is enacted into law, the cable operators would have ample opportunity to present their views at the rule-making proceeding the Commission would institute before adopting any rules to effectuate the statute.

We also propose striking the word "television" from Section 318. As previously noted, translators were conceived as simple, inexpensive devices designed to provide broadcast signals to the residents of sparsely populated, rural, remote, or mountainous areas. To make such stations economically feasible, Congress enacted Section 318 in 1960 to enable the Commission to permit television translator stations to operate without a licensed operator. At that time, there were only television translator stations. However, technological advances through the past decade have made FM translator stations possible and, in 1970, the Commisison authorized such stations. Now, in order to make the FM translator stations economically feasible, it is necessary to amend Section 318, as proposed, to authorize the FM translators to operate unattended in the same manner as is now permitted for television translator stations.

In sum, the Commission believes the public interest would be served by adoption of the proposed amendment.

Adopted: December 20, 1972, Commissioner Johnson concurring in the result.

FEE ASPECTS OF THE COPYRIGHT-CATV QUESTION—THE NEED FOR AN INDEPENDENT ARBITRATION TRIBUNAL

1. Payment of adequate copyright fees is essential in the public interest to safeguard the continued production of television programs and to encourage the creation of more numerous and of high quality programs.

2. For more than 12 years CATV (cable) systems had been involved in a controversy with program producers as to whether they are liable to copyright under the archaic 1909 Copyright Act when they retransmit broadcasts of copyrighted television programs and as to whether new copyright legislation should provide for such liability.

3. *This controversy has been settled in a "Consensus Agreement" by representatives of cable system owners, television stations and program producers.* The parties to this Consensus Agreement have pledged themselves to support full implementation of its provisions by the Congress and the Federal Communications Commission (FCC).

4. The FCC declaring that the terms of the Consensus Agreement were "within reasonable limits" and "of public benefit" promptly implemented it by issuing new cable rules effective March 31, 1972. These rules permit large-scale importations by cable, of programs from distant stations into the markets of local television stations.

5. On March 26, 1973, the Second Circuit in New York over-turned a decision by the District Court in CBS vs. Teleprompter, and declared among other things *that cable systems importing distant signals were liable for copyright fees.*

6. The Copyright Law Revision Bill, S. 1361, provides a compulsory license to CATV for the use by it of copyrighted programs upon payment of a compulsory license fee which would yield only a small fraction of what the program producers need to continue their production. This rate schedule was inserted into the bill *without* any prior hearings on this point and *without* the aid of any supporting economic data.

7. Both prior and subsequent to the Consensus Agreement representatives of copyright owners and of the cable industry have endeavored to agree on a rate schedule for joint recommendation to the Congress.

8. The Consensus Agreement expressly provides that "(u)nless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, *the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.*"

9. The representatives of the copyright owners and the cable industry have had many meetings in which both sides labored long and hard, but in spite of these repeated efforts, no schedule of fees has been agreed upon for joint recommendation to the Congress.

10. The reason for the failure of the parties to agree on a fee schedule is the complexity of determining the value to a cable system of the various types of programs used by CATV and of the losses which the owners of these programs will suffer from the expected diversion of their income from TV to CATV. Moreover, the assessment of these losses and values with respect to the owners of each type of program and each type of cable system requires complex economic data-gathering involving many thousands of variables.

11. As of December 1972, the cable industry rejected out of hand a proposal from the copyright owners to support in the legislation—as agreed upon in the Consensus Agreement—an Arbitration Panel to fix fees. In short, the cable industry refused to do what it agreed to do.

THE MECHANICS OF ARBITRATION

Chapter 8 of the Copyright Law Revision Bill establishes a Copyright Royalty Tribunal. This Tribunal could serve as the mechanism for the arbitration provided for in the Consensus Agreement. Such a Tribunal would be an objective body and not beholden to either the cable industry or the copyright owners. It would be able to deal equitably and *without bias*, on the fixing of fees.

An Independent Tribunal such as that to be organized pursuant to S. 801 of the Copyright Revision Bill (S. 1361) would seem to fit the definition of *fair* better than an arbitrary fixing of fees by legislation. Congress usually has believed that it has neither the time nor the expertise to deal with complex rate-setting procedures.

An Independent Tribunal is favoring to neither side. Indeed, it is possible the Tribunal may well, after its deliberations, determine that the cable operators ought to pay less fees than what the copyright owners so passionately feel is reasonable. But that is the principal and perhaps winning reason for the Tribunal—it is eminently fair, neither side has an advantage. The Tribunal will hand down its decision after full, complete and possibly mountainous piles of evidence will have been submitted. In that event, neither side can claim it was short-changed. The fairness of the Tribunal is its most valuable asset.

This is the compromise proposal that the film industry representatives made to the cable television representatives. They rejected it.

The new copyright bill shall contain the following provisions:

1. The Tribunal for compulsory arbitration shall be constituted and begin work no later than 2 months after enactment of the bill.

2. The Tribunal shall be mandated to make its award on the fee schedule within 12 months after enactment of the bill.

3. If the Tribunal should fail to make its award until sometime later than 12 months after enactment, the fees ultimately determined shall be payable from the cut-off date of 12 months after enactment.

4. The charge to the Tribunal shall be to determine "just and reasonable fees"—with no limitations on what factors they decide to include in their determination.

5. There shall be no legislative review of any award made at any time by the Tribunal. Judicial reviews shall be limited to those customarily allowed in arbitration awards—fraud, bribery, malfeasance—but not on the merits of the award itself.

6. If the Senate has not passed such a copyright bill by January 1, 1974, both CCO[1] and NCTA[2] agree to support separate copyright legislation embodying these provisions for cable television.

COPYRIGHT REVISION AND CABLE TELEVISION

BACKGROUND

On March 26, 1973, Senator McClellan introduced a bill for the general revision of the 1909 Copyright Act. S. 1361 is identical, but for certain changes in dates, to a bill reported out of the Senate Subcommittee on Patents, Trademarks, and Copyrights in December, 1969, but which never was reported out by the full

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[1] Committee of Copyright Owners.

[2] National Cable Television Association.

Committee on the Judiciary. General revision of the copyright law has been pending in the Congress for over six years.

Senator McClellan and others have attributed the delay in passage of a general revision of the copyright law to the controversy over how cable television should be treated under that law. In introducing S. 1361, Senator McClellan indicated that its cable television provisions would in any case have to be revised in light of the events since December, 1969, including, in particular, the adoption of new cable television rules by the Federal Communications Commission in February, 1972.

Attached in draft form are proposed changes in Section 111 (the cable television provision) and related Sections of S. 1361. These changes are the most appropriate way of taking care of the cable television issue, thereby clearing the way for the long-delayed general revision of the copyright law.

EXISTING LAW

Under the existing law, CATV systems that simply retransmit readily available signals from fairly nearby broadcast stations are not liable for copyright. *Fortnightly Corp. v. United States*, 392 U.S. 390 (1968). Recently it was held that when CATV systems retransmit "distant" stations, the signals of which are not readily available off the air to the cable system, they are subject to normal copyrighted works broadcast by the distant stations. *Columbia Broadcasting System, Inc v. TelePrompTer Corp*, —— F. 2d —— (2d Cir., Docket No. 72-1800, March 8, 1973). Under this decision, many existing cable systems would have to bargain and pay for the right to retransmit many of the programs broadcast by some of the stations whose signals the cable systems have been retransmitting in the past.

PROPOSED CHANGES IN S. 1361

The significant features of the attached changes to S. 1361 are as follows:

1. *The Consensus Agreement would and ought to be implemented.* In November, 1971, the leading associations representing the cable TV, broadcasting, and the major program producers (copyright owners) agreed to accept a compromise proposal for cable television regulatory and copyright treatment which has come to be known as the "Consensus Agreement" or more simply, the "Consensus." This Consensus was found to be in the public interest both by the FCC and by Senator McClellan. It calls for changes in the FCC regulatory policies, which were duly made and implemented over a year ago, and for copyright legislation consistent with that regulatory policy.

In adopting its new rules, the FCC said:

"We believe that adoption of the consensus agreement will markedly serve the public interest:

"(i) First the agreement will facilitate the passage of copyright legislation. It is essential that cable be brought within the television programming distribution market. There have been several attempts to do so, but all have foundered on the opposition of one or more of the three industries involved. . . .

"(ii) Passage of copyright legislation will in turn erase an uncertainty that now impairs cable's ability to attract the capital investment needed for substantial growth. . . .

"It is important to emphasize that for full effectiveness the consensus agreement requires Congressional approval, not just that of the Commission. The rules will, of course, be put into effect promptly. Without Congressional validation, however, we would have to re-examine some aspects of the program."

In a letter to the FCC incorporated as part of its report on the new rules, Senator McClellan said:

"As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties."

2. *CATV would receive a favorable compulsory license covering retransmissions of all local broadcast stations and certain distant broadcast stations.* Consistent with the Consensus, the attached changes would accord cable television systems a compulsory license to retransmit all signals lawfully being transmitted prior to March 31, 1972 (*i.e.*, all "grandfathered" signals), all "local" signals as defined

by the FCC and such other additional or "distant" signals as would be consistent with the rules adopted by the FCC in February, 1972. A compulsory license is a tremendous benefit for cable and gives it a competitive advantage over broadcasters because it eliminates the need for bargaining for every program. In the interests of reaching a compromise, however, the broadcast industry and the major program producers were willing to accept such a compulsory license for cable *provided that* it expressly would not include any more signal retransmission than was contemplated by the Consensus.

3. *No CATV system would have to stop retransmitting broadcast stations that were lawfully being retransmitted in the past.* The "grandfather" feature of the attached changes means that all existing cable TV systems can continue retransmitting whatever stations they were lawfully retransmitting on March 31, 1972, even though this means in many cases that cable TV systems would have more signals than the FCC's new rules would allow. This is very beneficial to cable TV systems and their subscribers, particularly in light of the recent judicial interpretation of the existing copyright law.

4. *Smaller, independently owned CATVs would not have to pay any copyright fees at all.* Under the attached changes, and again consistent with the Consensus, existing independently owned CATVs having fewer than 3,500 subscribers would get both the compulsory license described above *and* be free of any obligation to make payments for that compulsory license. This is a substantial plus for the smaller independent CATV, a plus which is *not* found in the present provisions of S. 1361.

5. *The scope of the compulsory license with respect to distant stations is and ought to be limited.* The Consensus provides that the compulsory license shall be limited to "those distant signals defined and authorized under the FCC's initial package" (in addition to local and "grandfathered" signals). In general terms, the FCC's initial rules contemplate importation of usually two distant signals into the 35-mile zones of larger markets, subject to certain exclusivity requirements, enough distant signals to provide adequate program service within the 35-mile zones of smaller markets, and virtually unlimited distant signal carriage beyond the 35-mile zones of all markets. By incorporating by reference the pertinent provisions of the FCC's rules, the attached changes would adopt corresponding limitations on the scope of the preferential compulsory license otherwise being given to cable systems. Without these limitations on the compulsory license no consensus would have been reached among the affected parties. While additional distant signals could be authorized by the FCC, subject to normal copyright liability, otherwise valid exclusivity agreements would be enforceable against any such additional retransmissions.

6. *The question of the amount of the compulsory license fee would be resolved in an impartial and fair manner.* Cable systems which do not come within the small system exemption noted above would have to pay a fee for their compulsory license. The sum of all such fees would in turn be apportioned among the various copyright owners. The Consensus provides that in the event the parties are unable to agree on a fee schedule, the legislation should provide that the fee schedule will be set by compulsory arbitration. Despite many meetings and negotiations since November, 1971, the parties have not been able to resolve their differences over the fee schedule. The compulsory arbitration approach set forth in the attached changes is not only consistent with the Consensus but also is a desirable means of freeing the Congress from having to resolve a complex and controversial dispute over the fee schedule.

7. *Judicial enforcement is authorized.* As expressly contemplated by the Consensus, both copyright owners and broadcasters would have the right to enforce valid exclusivity agreements through court actions.

8. *Treatment of sports events is unchanged.* The Consensus did not address the problem of retransmission of distant station broadcasts of professional team sports events. Thus the attached changes carry forward the special treatment of such events provided for in the present version of S. 1361.

OTHER POSSIBLE REVISIONS IN S. 1361 SHOULD BE REJECTED

1. *Approaches at variance with the Consensus should be rejected.* The new FCC rules adopted in 1972 benefit cable TV entreprenuers at the expense of broadcasters and program suppliers. Those rules were adopted on the assumption by the FCC and the affected parties that NCTA, the association representing cable TV, would actively support, and that the Congress would adopt, copyright legislation implementing the same Consensus as resulted in the new FCC rules. It

would be grossly unfair either to allow NCTA to renege on its November, 1971, commitment or to adopt copyright legislation still more favorable to cable TV than that which is contemplated by the Consensus. Moreover, rejection of the Consensus would only lead to the reopening of a controversy which has for too long delayed the general revision of the copyright law.

2. *A statutory fee schedule should not be included in the legislation.* At present S. 1361 includes a statutory fee schedule which some cable TV interests claim is either too high or at best the maximum that cable can afford to pay. The major program suppliers believe that the fee schedule in S. 1361 is unconscionably low, completely arbitrary and wholly unrelated to any economic or other data: the schedule has never been the subject of Congressional hearings. Both sides claim to have expert economic studies backing their respective positions. Resolution of such complex economic details as the precise amount of the fee is traditionally delegated by the Congress to independent agencies or arbitration. That approach should be followed here, and was specifically agreed to by the affected parties in a Consensus which the FCC, Senator McClellan, and others have found to be in the public interest.

3. *The compulsory license must not be left open-ended so that still more broadcast signals could be brought within its ambit.* With the attached changes, S. 1361 would subject CATV systems to normal copyright liability for retransmissions of copyrighted works broadcast by non-local stations when those transmissions are inconsistent with the 1972 FCC rules. This limitation on the ambit of the compulsory license is called for by the Consensus and was vital to reaching any consensus. Since a compulsory license constitutes preferential treatment of CATV at the expense of the program suppliers and broadcasters, it would be completely unfair to allow a four member majority of the FCC to expand the scope of that compulsory license by simple administrative fiat as would be the case if the compulsory license were open-ended. The limitation on the scope of the compulsory license is *not* a regulatory measure, nor is it a measure that unwisely ties the hands of the FCC. The FCC would retain full power to change its rules as it sees fit consistent with the public interest standards of the Communications Act. But the FCC would not be given, just as the FCC does not now have and should not have, the power to change the copyright law and thereby the power to take private property from one party and give it to another party simply through administrative dictates.

COPYRIGHT REVISION BILL

PROPOSED TEXT ON CABLE TELEVISION SUBMITTED BY COMMITTEE OF COPYRIGHT OWNERS

SEC. 111. Limitations on exclusive rights: Secondary transmissions

(a) Certain secondary transmissions exempted.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by a common, contract, or special carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided, That* the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmission; or

(4) the secondary transmission is not made by a cable system and is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recip-

ients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) Secondary transmission of primary transmission to controlled group.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.

(c) Secondary transmissions by cable systems.—(1) Subject to the provisions of clause (2) of this subsection (c), secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) in the following cases:

(A) Where the signals comprising the primary transmission are exclusively aural and the secondary transmission is permissible under the rules and regulations of the Federal Communications Commission; or

(B) Where the community of the cable system is in whole or in part within the local service area of the primary transmitter; or

(C) Where the signals comprising the secondary transmission are contemplated by and consistent with section 76.5(a), (f), (g), (h), (i), and (o) through (u) and Subparts D and F of the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252 *et seq.*, on February 12, 1972.

(2) Notwithstanding the provisions of clause (1) of this subsection (c), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the signals comprising the secondary transmission, whether or not authorized by the Federal Communications Commission, are inconsistent with, or in excess of those contemplated by, the rules and regulations of the Federal Communications Commission referred to in subclause (C) of clause (1) of this subsection (c); or

(B) Where the community of the cable system is in whole or in part within the local service area of one or more television broadcasting stations licensed by the Federal Communications Commission, and—

(i) the content of the particular transmission program consists primarily of an organized professional team sporting event occurring simultaneously with the initial fixation and primary transmission of the program; and

(ii) the secondary transmission is made for reception wholly or partly outside the local service area of the primary transmitter; and

(iii) the secondary transmission is made for reception wholly or partly within the local service area of one or more television broadcasting stations licensed by the Federal Communications Commission, none of which has received authorization to transmit said program within such area.

(d) Compulsory license for secondary transmissions by cable systems.—(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of the secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it together with the name and location of the primary transmitter, or primary transmitters, and thereafter from time to time, such further information as the Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause (1).

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall during the months of January, April, and July and October, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation and furnish such further information as the Register of Copyrights may require to carry out the purposes of this clause (2)—

(A) A statement of account, covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system and the gross amount irrespective of source received by the cable system.

(B) A total royalty fee for the period based upon a schedule or schedules to be determined as follows:

(i) Within sixty days after the enactment of this Act, the Register of Copyrights shall constitute a panel of the Copyright Royalty Tribunal in accordance with Section 803 for the purpose of fixing a schedule or schedules of just and reasonable compulsory license fees.

(ii) The schedule or schedules of compulsory license fees shall be determined by the Tribunal in a like manner as if the Tribunal were convened to make a determination concerning an adjustment of copyright royalty rates, *provided*, however, that Sections 806 and 807 shall not apply and that the determination of the Tribunal shall be effective at the end of the twelfth month after the enactment of this Act or on the date the Tribunal renders its decision, whichever occurs sooner.

(iii) The Tribunal, immediately upon making a determination, shall transmit its decision, together with the reasons therefor, to the Register of Copyrights who shall give notice of such decision by publication in the Federal Register within fifteen days from receipt thereof. Thereafter, the determination of the Tribunal may be subject to judicial review in a like manner as provided in Section 809 but no other official or court of the United States shall have power or jurisdiction to otherwise review the Tribunal's determination.

(iv) Notwithstanding any of the provisions of the antitrust laws (as designated in § 1 of the Act of October 15, 1914, c. 323, 38 Stat. 730, Tit. 15 U.S.C. § 12; and any amendment of any such laws) owners of copyrights in different works and owners of cable systems may among themselves or jointly with each other agree on, or submit to the Copyright Tribunal for its consideration, one or more proposed schedules of compulsory license royalty fees, and proposed categories of secondary transmissions and cable systems for inclusion in any of the schedules to be established or adjusted by the Tribunal pursuant to this subsection and Section 802.

(C) The preceding subclause (B) of clause (2) of this subsection (d), shall not apply to cable systems that before March 31, 1972, were operating in accordance with the rules and regulations of the Federal Communications Commission, served less than 3,500 subscribers, and were not, directly or indirectly, by stock ownership or otherwise, under common ownership or control with any other cable systems serving in the aggregate more than 3,500 subscribers, *provided* that this exemption shall continue to apply as long as the cable system continues to serve not more than 3,500 subscribers and is not directly or indirectly, by stock ownership or otherwise, under common ownership or control with any other cable systems serving in the aggregate more than 3,500 subscribers, and *provided further*, that such cable system files annually at the Copyright Office in accordance with requirements that the Register of Copyrights shall prescribe by regulation, a statement setting forth the names and addresses of other cable systems directly or indirectly in control of, controlled by, or under common control with the cable system filing the statement, the number of subscribers served by each of such other cable systems; and the names and addresses of any person or persons who directly or indirectly own or control the cable system filing the statement and directly or indirectly own or control any other cable system or systems, and the names and addresses of the cable systems so owned or controlled. For the purposes of this subclause (C) of clause (2) of subsection (d), "subscriber" shall mean a household or business establishment, or, if a hotel, apartment house or similar establishment, it shall mean a lodging or dwelling unit within such establishment containing a television receiving set.

(3) The royalty fees deposited under clause (2) shall be subject to the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions made during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws (as designated in § 1 of the act of October 15, 1914, 38 Stat. 730, Tit. 15 U.S.C. § 12, and any amendments of any such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the statement of account or the distribution of royalty fees deposited under clause (2). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative cost under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If he finds the existence of a controversy he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(C) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) Relation to other laws and regulations.—Nothing in this section shall be construed as limiting or preempting the authority of the Federal Communications Commission to regulate the operations of broadcast stations or cable systems pursuant to any other Act of Congress: *Provided that*, the Federal Communications Commission shall not limit the area, duration or other scope of the exclusivity a television broadcast station may acquire respecting secondary transmissions by cable systems that are not subject to the compulsory license provided for in subsection (c) of this Section 111 beyond any limits that may be applicable to the area, duration or other scope of the exclusivity a television broadcast station may acquire respecting other television broadcast stations.

(f) Definitions.—As used in this section, the following terms and their variant forms mean the following:

(1) A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

(2) A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission without change in program or other message content.

(3) A "cable system" is a facility that in whole or in part receives signals transmitted by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under Subsection (d)(2)(B), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

(4) The "local service area of a primary transmitter" as used in this section comprises the area in which a television broadcast station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register page 3252 *et seq.*, on February 12, 1972, or such similar rules as the Federal Communications Commission may from time to time lawfully adopt in the future in light of changed circumstances.

(5) The terms "full network station," "partial network station," "independent commercial station," and "non-commercial educational station" as used in subpart D of the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252, *et seq.*, on February 12, 1972, shall be defined in accordance with the rules and regulations of the Commission of the same date with such additional elaboration as the Commission may from time to time provide consistent with the intent of this Act.

(g) This section shall be effective upon the enactment of this Act.

[Add the following to section 501]

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section 501 be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television broadcast station.

THE MARINE BIOMEDICAL INSTITUTE,
Galveston, Tex., August 7, 1973.

MR. STEPHEN G. HAASER,
Senate Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, Dirksen Building, Washington, D.C.

SIR: I am Dr. Stewart G. Wolf, Professor of Medicine and Physiology, University of Texas Medical Branch, and Director, Marine Biomedical Institute 200 University Boulevard, Galveston, Texas; former President of the American Gastroenterological Association; American Federation for Clinical Research; American Psychosomatic Society; American Pavlovian Society; American College of Clinical Pharmacology and Chemotherapy. I am a member of twenty nine scientific societies, most of which societies sponsor medical serials. I am currently on the Editorial Board of the Journal of Psychosomatic Research, Psychiatry in Medicine, Research Communications in Chemical Pathology and Pharmacology, International Journal of Psychobiology, Rendiconti, and the Publications Center of the Journal of Laboratory and Clinical Medicine.

I appreciate this opportunity to present my view of the copyright bill S. 1361, and request that this statement be made part of the official record.

As the author of some 260 publications that have appeared in periodical medical journals and author or coauthor of twelve books, I would like to comment on the wording of the proposed copyright bill, especially Section 108, from the viewpoint of the author and user. Medical authors of articles that appear in the periodical literature not only receive no financial compensation for their work, but in most instances must pay page charges to the publisher for their work to appear. Thus the author's reward is not financial but is in direct proportion to the extent of his readership, both in numbers and geographic distribution. It is, therefore, to his advantage as well as the advantage of the user to have interlibrary requests for photocopies promptly and expeditiously filled. The normal medical user employs the photocopy in the pursuit of his own work and applies it to no commercial purpose. In short, the author of medical periodical articles derives no financial protection from the Copyright Law but, like the user and often, as a user himself, benefits from a rapid and expeditious distribution of his written word.

I have read the substitute wording for Section 108 (1) suggested by the American Library Association and feel that it is an equitable compromise of the various potentially conflicting interests. It reads as follows:

"The library or archives shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or phonorecord of a similarly small part of any other copyrighred work."

I appreciate the opportunity to provide testimony before your Committee.

Sincerely,

STEWART WOLF, M.D.,
Professor and Director.

MEDICAL LIBRARY ASSOCIATION, INC.,
Birmingham, Ala., August 3, 1973.

MR. THOMAS C. BRENNAN,
Chief Counsel, Subcommittee on Patents, Trade Marks and Copyrights, Committee on the Judiciary, U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR MR. BRENNAN: The Medical Library Association is made up of libraries and librarians located in all types of health service facilities. As President of this Association, it has come to my attention that in the congressional hearing on July 31 of the Subcommittee on Patents, Trade-Marks, and Copyright on S. 1361 the publishers' testimony emphasized that numbers of journal subscriptions were cancelled due to Xerox copying. May I, as the director of a medical center library, assure you that cutback on subscriptions is not due to this alone; the subscriptions dropped from this library's list have had nothing to do with Xeroxing. Our reasons are monetary. The line item of the Books and Journals budget was spent in five months this year due to the increase in cost of journal subscriptions. This increase was not an addition of new titles but a rise in the price of the 2,100 journal titles currently being purchased. May I point out that other price increases have been continuing through the year. For example, a notice was received recently of a 25+% price rise in *Chemical Abstracts*.

The second copy titles are being dropped to relieve some strain; our duplicate journals with other libraries on the same campus are being dropped for the same reason and a number of foreign language periodicals are having to be cancelled only because we feel it is imperative to continue to buy our most heavily used English language journals.

There is little hope that the Books and Journals budget for the new fiscal year can take care of the increases in journal prices.

This situation is being faced by medical librarians throughout the United States. Consideration by the Subcommittee of this reason for cancellation of subscriptions will be appreciated.

Sincerely,

(Mrs.) Sarah C. Brown,
President.

Supplemental Statement of the Medical Library Association

This supplement to the statement of the Medical Library Association on July 31, 1973 on the library photocopy issue in S. 1361 is submitted in order to clarify what may appear to be a contradiction of Section 108(d)(1) and 108(d)(2) in the amendment proposed by the Association of Research Libraries and the American Library Association, and endorsed by the Medical Library Association.

The difference in the proposed limitations reflects a difference in the quantity of the copyrighted matter to be used. In sub (1) the right to make a single photocopy of a periodical article without prior investigation is proposed because the portion to be copied is so small that the effort of the search for an unused issue of the journal would be out of proportion to the extent of the article and the delay incompatable with the user's time schedule. On the other hand, sub (2) applies to a copy of an entire work or a large portion of one, and is deemed reasonable, because the need is usually less urgent, whether the copy is required by a reader for his personal use or by the library to fill a gap in its collection. Thus the time frame is usually sufficient to accommodate a search for an unused copy and the costs are comparable.

The proposal of these two different limitations reflects the librarians' desire to fulfill their obligation to satisfy the users, and at the same time to keep their work in manageable proportions.

Supplemental Statement of Jack Valenti, President of the Motion Picture Association of America, Inc. and of the Association of Motion Picture and Television Producers, Inc., August 10, 1973

We appreciate the opportunity to submit this supplemental statement to the Committee and to comment in behalf of the Motion Picture Association of America, Inc. ("MAPA"), the Association of Motion Picture and Television Producers, Inc. ("AMPTP") and the Committee of Copyright Owners ("CCO"), on some of the views which have been expressed by other witnesses at the hearing of August 1, 1973. More specifically, we shall address ourselves to the following points:

1. NCTA has repudiated the Consensus Agreement while seeking to retain its benefits.
2. NCTA has failed to demonstrate any rational basis for rejecting arbitration of the fee question.
3. Cable systems can easily afford to pay just and reasonable royalties without raising fees to subscribers. CCO has never suggested that subscribers fees should be raised in order to pay copyright royalties.

4. CATV revenues are based on the use of copyrighted programs and CATV should pay its fair share for their use. Copyright owners will not receive double royalties from payment of copyright fees.

5. Several of the changes proposed by NCTA for the text to Section 111 of S. 1361 are unwarranted, especially those dealing with the definition of cable systems and with the exemption from copyright liability of CATV's retransmission of scrambled signals such as those used for closed circuit broadcasts and pay-TV.

Attached to this supplemental statement as an Appendix "A" is a memorandum prepared by Dr. Robert W. Crandall, Associate Professor of Economics at the Massachusetts Institute of Technology and by Mr. Lionel L. Fray of Temple, Barker & Sloane, Inc., management and economic counsel. These two gentlemen are the authors of the study commissioned by CCO entitled "The Profitability of Cable Television Systems and Effects of Copyright Fee Payment," which we submitted to the Subcommittee on August 1, 1973 as a special appendix to our statement. Professor Crandall and Mr. Fray were present at the hearing of August 1, 1973 and their memorandum (Appendix "A") addresses itself to the questions of an economic or statistical nature raised by the Chairman and comments on some of the views on economic matters expressed by witnesses at said hearing.

1. NCTA HAS REPUDIATED THE CONSENSUS AGREEMENT WHILE SEEKING TO RETAIN ITS BENEFITS

In his testimony on August 1, 1973, Mr. David Foster, President of the National Cable Television Association ("NCTA"), referred to the Consensus Agreement as the "so-called 'OTP Compromise' ". Such attempt by means of terminology to give the impression of only limited governmental sponsorship and support for the Consensus Agreement, cannot, of course, erase or extenuate the embarrassment which NCTA experiences as the result of the repudiation of its solemnly given word and signature to that agreement. Indeed, it cannot be denied that the Consensus Agreement received the expressed approval not only of the Office of Telecommunications Policy (OTP) but also of the Federal Communications Communication ("FCC") and of the Chairman of this Subcommittee.

The history and sponsorship of the Consensus Agreement has been fully explained by FCC Chairman Dean Burch when he said in his concurring statement accompanying the Cable Television Report and Order:

'I joined OTP . . . in an effort to secure a consensus among the industries that would lead to resolution of the cable/copyright issue, de-escalate the level of violence, and thus greatly serve the public interest.

* * * * * * *

"[The FCC] debated the details of the agreement. We debated the necessity of implementing it in its entirety. We debated its probable impact on the passage of cable/copyright legislation, and the critical importance of such legislation to cable's assured future.

"We went over every square inch of the ground—and then went over it again. And, in the end, we voted: a majority of the Commissioners explicitly decided that the public interest would be served by the Commission's implementation of the agreement."

Mr. Foster also overlooks the correspondence between Chairman Burch and Chairman McClellan which preceded the implementation of the Consensus Agreement by the FCC. In that correspondence Chairman Burch stated in his letter to Chairman McClellan dated January 26, 1972 that "a primary factor in [the FCC"s] judgment as to the course of action that would best serve the public interest is the probability that Commission implementation of the Consensus Agreement will, in fact, facilitate the passage of cable copyright legislation." In his reply to said letter, Chairman McClellan wrote on January 31, 1972: "I commend the parties for the efforts they have made, and believe that the agreement that has ben reached is in the public interest and reflects a reasonable compromise of the positions of the various parties." Copies of the correspondence between Mr. Dean Burch and Senator McClellan were attached to our statement filed on August 1, 1973 as Appendix 2.

Mr. Foster asserts "that the Congress was not a party to this so-called compromise, nor to our knowledge was it consulted with, nor is it bound by the terms, in any way." Mr. Foster misses the point here. The question is not whether Congress is bound by the terms of the agreement—which of course it is not but rather whether NCTA has pledged its support of the agreement as part of a package deal under which NCTA received significant benefits and whether in good faith, it should be permitted to withdraw its support for a provision which constituted a concession on its part, namely that the amount of fees under the compulsory license be set by arbitration in the absence of an agreement thereon by the parties.

We respectfully submit that in opposing arbitration, NCTA has violated the letter and the spirit of the Consensus Agreement. It should not be permitted to retain the benefits of an agreement the obligations of which it has repudiated.

2. NCTA HAS FAILED TO DEMONSTRATE ANY RATIONAL BASIS FOR REJECTING ARBITRATION OF THE FEE QUESTION

In all the sound and fury directed by the spokesmen of the cable industry against the initial setting of fees by the Copyright Royalty Tribunal, not a single valid argument has been presented against the fairness of doing so. Thus, in asserting an alleged present unavailability of sufficient empiric data, the CATV spokesmen overlook the fact that even according to the most optimistic forecasts, the bill S. 1361 will not be enacted until the end of 1974 so that the Tribunal will not be able to start its hearings until 1975. By that time and certainly by the time the Tribunal will reach its decision, more than three years will have passed since the time when the freeze on cable systems in the top 100 markets was lifted by the FCC (i.e., March 31, 1972). It is obvious that the Tribunal at that time will have at its disposal all necessary data and certainly more data than the Subcommittee would have to go by today if it had to set fees now.

Far from being an argument against entrusting the Royalty Tribunal with the rate-setting task from the outset, the alleged present unavailability of economic data if it in fact existed, would be an argument against setting the rates now in the bill. In any event, as shown in the memorandum of Professor Crandall and Mr. Fray (Appendix A attached hereto), ample data are available at the present time to support an appropriate fact-finding and rate-setting procedure before the Tribunal. The Tribunal will have the opportunity to hear and sift the data which the experts for all parties will present to it and will be in the position to set rates based on the consideration and evaluation of the economic evidence before it, an opportunity which this Subcommittee will not have had because of limitations of time.

The only other argument presented by Mr. Foster against arbitration is the "precedent for compulsory licensing since ASCAP, BMI and SESAC contractually grant them to networks, local broadcasters and others for all musical works." But as Mr. Foster concedes by his insertion of the word "contractually" and as the representatives of the music performance societies testified at the hearing on August 1, 1973, these music performance licenses are indeed contractual licenses, not compulsory ones, and the license fee therefor is set by agreement between the parties subject to supervision by the U.S. District Court. This is a far cry from what the cable industry urges the Congress to do. Indeed, this procedure to set music performance fees is very close to the one which the cable industry pledged itself to support by the Consensus Agreement but is now unwilling to support.

Accordingly, a closer examination of the only two arguments presented by cable spokesmen in opposition to arbitration reveals that these arguments actually support arbitration as the most practical and fairest method to do justice to all concerned.

It is interesting to note that with respect to distant signals, Mr. George J. Barco, General Counsel of the Pennsylvania Cable Television Association, in his statement filed with the Subcommittee, agrees with the position of the Copyright Owners on arbitration of payment for such signals when he concedes that "providing reception of distance signals transported by microwave or otherwise, being a matter of choice and a calculated risk for the CATV companies that choose to do so, is properly subject to a bargaining process or for the ultimate arbitration arrangement."

The procedure of having the initial rates set by the Tribunal has such obvious merit and no discernible disadvantages, that the opposition thereto by the cable industry remains shrouded in mystery and incomprehensible to the impartial observer. Indeed, the only rational explanation of this opposition is that the cable industry, in light of its intimate knowledge of its own prosperous economic and financial affairs, has formed the selfish opinion that the fees set in the bill are so low that the Tribunal after hearing the evidence is certain to set it at a substantially higher rate. Such self-serving opposition to a fair method of resolving a controversy and such attempt to secure for itself an unreasonably low rate for the initial period and one prejudicial to the copyright owners for future adjustments, should not be countenanced especially in view of the cable industry's consent to arbitration in the Consensus Agreement.

3. CABLE SYSTEMS CAN EASILY AFFORD TO PAY JUST AND REASONABLE ROYALTIES WITHOUT RAISING FEES TO SUBSCRIBERS. CCO HAS NEVER SUGGESTED THAT SUBSCRIBERS' FEES SHOULD BE RAISED IN ORDER TO PAY COPYRIGHT ROYALTIES

At the hearing, Mr. Barco accused CCO of having suggested to the negotiators for the cable industry that they should pass on the copyright fees which they may have to pay to their own subscribers. We submit that this accusation is just a smokescreen to deflect public attention from the huge profits of cable operators who are reluctant to pay even a small share thereof to those who create the programs which cable systems sell to their subscribers. To set the record straight: *At no time has it been the position of CCO that subscribers' fees should be raised or would have to be raised in order to pay copyright fees.* Indeed, such position would have been wholly inconsistent with the demonstration to the negotiating committee of the NCTA made by the copyright owners with the aid of their economic consultants, that the income of the CATV industry would be ample to pay the license fees sought by the copyright owners. (See the Crandall Fray study on "The Profitability of Cable Television Systems and Effects of Copyright Fee Payments" mentioned above.)

It is noteworthy that in pleading his case, Mr. Barco mentions substantial increases in basic costs incurred by the cable industry such as "pole attachment fees" paid to telephone companies which he states are being increased currently from 40% to 70% across the nation. Mr. Barco fails to explain why the cable industry stands ready to absorb these costs but mobilizes such violent resistance to the payment of compensatory copyright fees.

Mr. Barco seems to argue that copyright fees are the proverbial straw that breaks the camel's back. Yet no reason is apparent why the creative element of the television industry should be singled out to be that straw and be called upon to subsidize the new technology. The economic absurdity of this position becomes apparent when we consider that neither the suppliers of equipment to his industry nor the utility companies which furnish it with electric power, nor the franchising municipalities are asked to make similar sacrifices.

Mr. Barco refers to "the vagaries and inordinate demand" of the copyright owners. Such charges seem ill addressed to the copyright owners who are willing to submit the justice and reasonableness of the fees they seek to an independent fact-finding Tribunal for thorough investigation while Mr. Barco finds such fact-findings so threatening to his position that he is willing to repudiate an obligation solemnly assumed by his industry in the Consensus Agreement.

4. CATV REVENUES ARE BASED ON THE USE OF COPYRIGHTED PROGRAMS AND CATV SHOULD PAY ITS FAIR SHARE FOR THEIR USE. COPYRIGHT OWNERS WILL NOT RECEIVE DOUBLE ROYALTIES FROM PAYMENT OF CABLE COPYRIGHT FEES

The contention made by Mr. Foster that royalty payments by CATV represent a "windfall gain" and the assertion of Mr. Barco that because the copyright owner has "already received payment in his contractual arrangements for the broadcasting, paid ultimately by the television viewers—including CATV subscribers—in the advertising costs of purchased products", are based on a series of economic fallacies.

Advertising carried on television may be of a national, regional, or local nature. No regional or local advertiser is willing to pay a premium over normal advertising rates because its commercials are carried by CATV to far distant markets where the advertiser has no facilities to serve customers. It is obvious that a furniture dealer in Los Angeles or a used car dealer in Chicago will not pay a penny more to a station for broadcasting commercials which are being retransmitted by CATV to Omaha, Nebraska or Wichita, Kansas. For the same reason the station whose programs are thus exported to other markets will not pay increased license fees to the copyright owners for such additional use of the program. At the same time the copyright owner in the many instances not covered by the FCC's non-duplication rules will be rendered unable to grant an exclusive license to the local station for programs already imported into that market by CATV systems.

Consequently, a television station is not willing to pay the program supplier a higher price for programs with local or regional commercials shown outside of the station's own market area. Similarly, national advertisers will place little, if any, value on duplicated coverage of their commercials by CATV when it imports these commercials into a different market and duplicates them with those carried by the local station in that other market.

It is because of these basic economic facts of the television program market that Mr. Foster is not correct when he claims that the "royalties now being paid by broadcasters to copyright owners are based, generally, on the size of the audience reached—including CATV subscribers". Indeed the Court of Appeals for the Second Circuit in *CBS* v. *Teleprompter*, 476 F.2d 338 at p. 342 (fn. 2) rejected a similar argument made by the defendant CATV systems in that case and said that "the amount that a broadcast station is willing to pay for the privilege of exhibiting a copyrighted program is economically tied more to the fees that advertisers are willing to pay to sponsor a program than to some projected audience size." The Court further observed that no evidence had been presented "to show that regional or local advertisers would be willing to pay greater fees because the sponsored programs will be exhibited in some distant market, or that national advertisers would pay more for the relatively minor increase in audience size that CATV carriage would yield for a network program." The Court of Appeals concluded that "indeed, economics and common sense would impel one to an opposite conclusion."

As to the use by CATV of programs from *local* stations the copyright owners are also entitled to receive just and reasonable royalties for the use of such programs by CATV. The fact that the local station has already paid for *its own right* to broadcast the program should not deprive the copyright owner of his right to collect royalties from CATV. Indeed, the cable system makes its own independent profit from the retransmission and out of these profits should make a fair contribution to the cost of program production.

A compulsory license is an extraordinary legal device demanded by the cable operators and accepted by the copyright owners in the Consensus Agreement because of the asserted administrative difficulty of clearing copyrights for cable systems. In fairness to all parties concerned, the amount of the compulsory license fees should be compensatory and for that purpose should approximate as closely as can be ascertained, the amounts which the beneficiaries of the compulsory license would have paid in a free market without administrative difficulties and without the compulsory license.

It is a fundamental principle of our economic system that if we use someone else's property for our own benefit, we must pay the owner of the property for permitting such use. Applied to the retransmission by CATV of signals for which the broadcaster has already paid a fee for his own use, this means that in a free market where the consent of the copyright owner for the use of the program would have to be bargained for, some payment would certainly be agreed upon between the copyright owner and the cable system in return for the granting of a contractual license. It is the amount of this payment which should be taken into consideration in setting license fees for local signals under the compulsory license.

It should also be kept in mind that in the nation's largest markets, the number of local signals available for carriage by CATV is likely to make the wholesale importation of distant signals unnecessary. At the same time, if the carriage of local signals by CATV were to be exempted from copyright royalties, the large revenues of these metropolitan systems would be immunized from contributing to the cost of program production by reason of the fact that these systems rely primarily on the retransmission of programs from local stations.

Equity requires that *all* cable systems should carry their fair share of the cost of production of the television programs which they use for their profit, that they should pay a reasonable compulsory license fee reflecting the value of the use of the programs to them including local signals, and that the burden of the cable industry's contribution to the cost of program production should be shared fairly between the various types of CATV systems in large as well as small markets.

5. SPECIFIC PROPOSALS PUT FORWARD BY NCTA FOR AMENDING SECTION 111 OF S. 1361.

In his statement of August 1, 1973, Mr. Foster, put forward certain specific proposals for amending Section 111 of S. 1361. With respect to these proposals we would like to make the following comments:

(a) NCTA proposes certain changes in Section 111(f) which would affect the definition of the terms "primary transmission," "secondary transmission," and "cable system." With respect to the definition of the term "cable system," NCTA suggests that it be limited to only those systems "within a political subdivision within which the facility operates." *This definition is of critical importance to the copyright owners.* In our initial statement to the Committee we took issue with this approach which would split up a cable system unrealistically whenever it crosses a political boundary and would fragmentize its revenues artificially under the progressive royalty rate. Accordingly, we urged the adoption of the following definition which comports more fully with the realities of the industry and is more logical in determining an appropriate copyright royalty fee:

"For purposes of determining the royalty fee under Subsection (d) (2) (b), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system."

As respects the proposed changes in the definitions of "primary transmission" and "secondary transmission," NCTA seeks to introduce new concepts and terminology into the language of the bill which are unsupported and which could distort basic meanings throughout the text. At this point in the long evolution of the copyright legislation, we see no reason to depart from the present definitional language absent some clear understanding of the purposes underlying the proposed amendments.

(b) NCTA also suggests that Section 111(b) pertaining to the secondary transmission of a primary transmission to a controlled group should be a matter for regulation by the FCC and should not be included in the copyright law. We disagree strongly with this suggestion.

Section 111(b) provides that the secondary transmission to the public of a primary transmission embodying a performance or a display of a work is subject to full copyright liability if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. This provision is derived from a provision which was contained in H.R. 2512 which passed the House of Representatives in 1967. House Report No. 83 (90th Congress, 1st Session), p. 56, states the purpose for which this provision was included in the bill:

"There are, however, a number of primary transmissions that are to the 'public' but are not capable of reception by the public at large. Examples include background music services such as Muzak, closed circuit broadcasts to theatres, pay-TV, and CATV itself. Clause (4) of Section 111 (b) makes clear that a community antenna system has no privilege of retransmitting a primary transmission that 'is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.' "

By urging that this provision should be deleted from the bill, NCTA takes the view that the general public should pay for over-the-air subscription programs but cable subscribers should not. Thus, if a sports event or a movie is offered to the public by a pay-television station using "scrambled" or coded signals, cable systems would be enabled by NCTA's proposed deletion to unscramble and redistribute these programs to their subscribers without any additional charge or payment. Such a result is patently unfair to the public as well as to the copyright owner. Indeed, it is the very result which Section 111(b) seeks to avoid.

Further, the claim that this change in Section 111(b) is necessary to meet the rules and regulations of the FCC does not withstand analysis. It is based on the assumption that the requirement of carriage of all local signals by cable systems includes the carriage of "scrambled" pay-television broadcast signals and their "unscrambling" by cable systems. Not only is there nothing in the FCC rules or regulations to support such an interpretation, but the rules are directly to the contrary. Section 76.55(b) of the FCC rules provides:

"There a television broadcast signal is carried by a cable television system, pursuant to the rules in this subpart, the programs broadcast shall be carried in full, without deletion or alteration of any portion except as required by this part."

Thus, even assuming that the rules can be construed to require cable systems to carry all local signals including such "scrambled" signals as may be emitted by a local pay-television broadcast station, they specifically prohibit the alteration or "unscrambling" of these signals. In short, under the guise of conforming the copyright law to the FCC rules, NCTA is attempting to reap a windfall by permitting the unauthorized secondary transmission of pay-television programs by cable systems.

(c) NCTA suggests that the exemption from copyright liability for hotels, apartment houses, or similar establishment that retransmit signals to the private lodgings of guests or residents in Section 111(a)(1) should be eliminated and that such systems should be treated as cable systems subject to the compulsory license fee. The thrust of this position is that there is no difference between so-called master antenna systems and a cable system where the cable system receives and distributes only local signals. NCTA takes the position that since master antenna systems obtain the benefits from using copyrighted programs, they, too, should pay copyright royalties. It is our view that if such copyright liability is imposed on master antenna systems an exemption be provided for systems with fewer than a specified number of subscribers.

(d) NCTA also suggests that the exemption for government owned and nonprofit cable systems in Section 111(a)(4) should be eliminated and that these reception and distribution facilities should be treated as cable systems subject to the compulsory license fee. We agree that the exemption for governmental and nonprofit systems is overly broad, but we do not agree that the provision should be deleted.

In our initial statement filed with the Committee on August 1, 1973, we pointed out that this provision is concerned with the operation of nonprofit "translators" or "boosters" which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception. These translators and boosters have always been subject to FCC regulation and require retransmission consent of the originating station under Section 325(a) of the Communications Act.

However, the language of the exemption contained in Section 111 (a)(4) would be equally applicable to cable systems which are operated by governmental bodies or nonprofit organizations. Thus, in order to limit the exemption to nonprofit translators and boosters and similar secondary transmitters, we proposed to insert into the text of Section 111(a)(4) the words ". . . is not made by a cable system . . .". Since we continue to believe that the exemption should be maintained for the benefit of the translator and booster systems described, we submit that complete elimination of this exemption would be improper and that the appropriate solution is adoption of the amendment we have submitted in Appendix V to our initial statement.

(e) NCTA favors the adoption of Section 111(d) "as written." It suggests, however, that systems of 3,500 subscribers or less be exempt from copyright fees and that an appropriate amendment be made to accomplish this purpose.

The question of providing an exemption for cable systems with fewer than 3,500 subscribers is discussed at length in our initial statement. We made clear that the exemption for smaller systems was an integral part of the Consensus Agreement and that if the Agreement were disturbed as to any one part, particularly the question of arbitration of fees, the copyright owners would not support the 3,500 exemption. In this regard we must point out that NCTA has abandoned the Consensus Agreement on the question of arbitration of fees while vigorously maintaining its support of the 3,500 exemption. Indeed, the statement of Mr. Barco, goes even further and urges the application of the 3,500 exemption to all systems as a basic deduction from the payment of all fees. It should also be noted that neither NCTA nor Mr. Barco mention that under the Consensus Agreement the exemption for systems with 3,500 subscribers or less would only apply to "independently owned" systems "now in existence," (i.e., at the time of the Consensus Agreement). To insure that these conditions are met, we have proposed an amendment to Section 111(d) to implement the proposed 3,500 exemption as well as other clarifying language. These amendments are contained in Appendix V to our initial statement. They are dependent, of course, on full implementation of the Consensus Agreement.

(f) NCTA supports the provisions of Section 111(e) with adjustments "to reflect the elimination of the regulatory aspects." We concur in the view that Section 111(e) relating to preemption of other laws and regulations should be amended. However, since NCTA has not suggested any draft language, we direct the Committee's attention to the language contained in Appendix V of our initial statement.

(g) Finally, NCTA suggests an amendment to Section 110(5) of the bill for the purpose of clarifying the relationship of secondary transmissions to the dissemination of educational television programs. Since Section 110(5) does not pertain to an exemption for educational purposes but to an exemption for the communication of a transmission embodying a performance or display of work on a single receiving apparatus, we see no basis for the amendment offered by NCTA nor any logical need for a change in Section 110(5) of the bill to conform it to the provisions of the legislation on a cable television.

APPENDIX A

COMMENTS OF ROBERT W. CRANDALL AND LIONEL L. FRAY

INTRODUCTION

In their statements before the Subcommittee on August 1, 1973, representatives of the cable television industry, and their economic consultant, Bridger Mitchell, argued in part that the growth of the cable television industry would be impaired even if the very low schedule of compulsory copyright fees proposed in S. 1361 were adopted. In addition, they made other statements regarding the industry's economics.

We believe some commentary from a different perspective would be of benefit to the Subcommittee. Our comments are organized topically as follows.

1. Economic Analyses of Copyright Fee Payments
2. Subscriber Penetration
3. The Effects of New Cable Services upon Estimated Profitability
4. Owners' Expectations of Cable Profitability
5. New Systems and Franchises in the Top 100 Markets
6. Effects of the Definition of a Cable Television System
7. The Effect of Modifying the Proposed Fee Schedule
8. Availability of Evidence for the Determination of Copyright Fees

1. ECONOMIC ANALYSES OF COPYRIGHT FEE PAYMENTS

The analysis submitted to the Subcommittee which relates to the economic effects of the schedule of copyright fee payments proposed in S. 1361 consists of two studies; one by Bridger Mitchell dated September 30, 1972, *Cable Television under the 1972 FCC Rules and the Impact of Alternative Copyright Fee Proposals;* the other by the authors of these comments, dated April 25, 1973, *The Profitability of Cable Television Systems and Effects of Copyright Fee Payments.* These two studies arrived at sharply different conclusions.

In his testimony before the Subcommittee on August 1, Mitchell summarized his study and its gloomy conclusion that a cloud of prospective low profitability hangs over the future development of the cable industry, and that even the very modest schedule of copyright fees proposed in S. 1361 in payment for the most essential ingredient in the cable television business—programming—would darken the cloud to the point where the rains would fall and the cable industry would be virtually washed away.

We do not in general take issue with Mitchell's methodology of constructing a "financial model" of a typical cable television system as a basis for reaching public policy conclusions of the sort under consideration by the Subcommittee. Indeed, the model we employed in our analysis is very similar to his. But we differ sharply with Mitchell in specifying the values of several parameters which are inserted into the model and which dictate the low estimates of profitability which he obtains. Two of these parameters—subscriber penetration and revenue growth—are critical in any calculation of profitability, and we believe that more optimistic values of these numbers, based upon projections developed by the cable industry itself, are a far more satisfactory basis for predicting the future profitability of cable investment. Utilizing these data and making a few other relatively minor modifications, we conclude that cable television systems could expect to earn enough profits to insure attracting all the necessary capital required for the industry's growth, even after payment of copyright fees substantially higher than those proposed in S. 1361.

Although our study was made widely available at the time of its publication some months ago, Mitchell did not dispute the evidence which determined these key differences underlying the two studies' respective conclusions, nor did he present new evidence which might affect them. We are therefore not able to understand how he continues to adhere to the conclusions of his earlier study which he reiterated before the Subcommittee.[1]

We might note in passing that the fees proposed in S. 1361 are based upon gross revenues. If, however, the Subcommittee wished to see profitability or ability to pay as a determinant of the amounts of copyright fee payments, the best single indicator we know of is penetration. This variable far outweighs all the other ones commonly used. But the fact remains that the accurate determination of system profitability is a complex function of many variables having to do with system location, availability of off-the-air signals, density, costs, etc. For this reason, a simple formula will almost always produce results which in many cases will be inequitable.

2. SUBSCRIBER PENETRATION

Subscriber penetration is the most important single determinant of cable system profitability. As used by both Mitchell and us, penetration is defined as the ratio of subscribers to the total number of homes passed by the trunk cable; that is, the potential immediately available to a cable system without laying more trunk cable. If penetration is low, only a few of the potential subscribers are contributing revenues to amortize a cable system's relatively large investment in capital equipment. In such a case, the profitability of the system would clearly be low or negative. If penetration is high, however, very substantial revenues will be generated relative to a cable company's investment. In such cases, profitability can be extremely high.

Mitchell's study projects that mature penetration near the edges of the top 100 markets—that is, the level of penetration achieved after many years of operation and promotion of the system services in the local market—will be 34 to 45%, and in the center of such markets only 22% to 35%. These projections are derived from an academic study conducted by his colleague, Dr. Rolla Edward Park of The Rand Corporation. This study is based upon a confidential sample of 63 systems whose identity have not been revealed. Moreover, there has been no verification of the predictions of this study in any publication. Finally, even its author does not utilize its results as literally as Dr. Mitchell in applying to real situations. For example, Park has predicted that Dayton will realize a subscriber penetration rate of 40 percent of homes passed, considerably above the 22 to 35% which Mitchell projects for central cities in the top 100 markets.

While Dr. Mitchell used the predictions of Park's model, we chose to use the industry's own predictions since the latter are based upon informed judgments of the potential appeal of cable services now beginning to develop, but which are totally ignored by Park. The NCTA's own survey to multiple system owners, furnished to the CCO by the NCTA, reveals that these firms expect much stronger demand for their services and they anticipate mature penetration of 65%.

How can these predictions diverge so dramatically with those reproduced by Mitchell from Park's study? The answer is quite simple. Even at present there is a strong movement towards nonbroadcast offerings by cable systems. Some are now offering special channels of recent motion pictures. Other systems are beginning to offer sports channels on a similar basis, and in testimony before this Committee it has been suggested that NFL teams may even begin offering their "blackout" games on a pay-cable basis to local patrons unable or unwilling to purchase a stadium ticket. Clearly, these services and many others which will develop shortly will have the effect of making cable much more attractive to households—even to those able to receive three network signals with clarity. We agree with Mr. Foster of the NCTA that academic studies of cable demand are not likely to provide good predictions because future conditions will be different from those today. We suggest as one alternative the survey of his own members.

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[1] The only attempted rebuttal was offered by Mr. Foster (pp. 30–31 of his testimony) in quoting Mr. Kagan's published remarks, whose only discernible point of possible substance related to the "vulnerability" of our report as exemplified in our statement that most systems do not publicly report their financial statements thus making precise cost estimates difficult. Mr. Kagan apparently failed to read the detailed section on operating costs which followed, for not only do we utilize reported cost data, but we present cost data for a sample of systems comprising 781,000 subscribers, more than 12 percent of the industry at that time. Mr. Kagan reports on this effort by noting that "Because of this, the study concluded, it was not possible to work with precise CATV operating cost data."

There is no substantive criticism of our operating cost analysis in Mr. Foster's testimony, perhaps because we choose to present results based upon Dr. Mitchell's cost parameters.

While we employ the NCTA estimates of subscriber demand in projecting the profitability of cable systems, we also utilize a more conservative assumption for the top 100 markets—55.3% of homes passed, the datum which the NCTA claims is representative of 1972 conditions. As a final calculation, we even utilize a very low 40% subscriber penetration assumption, and we find that copyright fees can be paid by systems in the top 100 markets with this very low subscriber penetration if revenues per subscriber grow by at least 2% per annum. Since few cable systems will be built in anticipation of subscriber penetration of less than 40% of homes passed, this provides a lower limit to anticipated profitability which is in the range of 14.3 to 19.2%. We cannot disagree with Mitchell's pessimistic projections for middle-market systems if they are connected to only 22 to 35% of homes passed. We simply do not believe, however, that profitability estimates should be based upon subscriber penetration levels of systems which even by Mitchell's own assertion will not be built.

3. THE EFFECTS OF NEW CABLE SERVICES UPON ESTIMATED PROFITABILITY

It is now a well-accepted principle of public-utility regulation that all of the capital facilities required for the generation of joint products should not be allocated to only one of these products or services. It would be equally falacious to attribute all of the profits of a very profitable cable system to leased channels and to assign the cost of the capital facilities required to transmit these channels entirely to the retransmission of broadcast signals offered by the cable owner. For this reason, we have calculated the profitability of cable systems under the assumption of modest revenue growth from new services. To do otherwise would understate the ability of these systems to pay mandatory copyright fees.

In his testimony, however, Mitchell admitted that he did not include the revenues or costs from new services such as leased channels or pay cable in his study because the "programming shown on such channels is fully subject to the present copyright law." While we do not doubt that cable owners will be required to compensate copyright owners for this additional programming in proportion to the added net revenues generated, we cannot agree with Mitchell in excluding these revenues from the analysis of overall cable profitability. These leased or pay channels will utilize the same capital equipment as the retransmitted broadcast signals and will contribute to amortizing this investment. Therefore, it is invalid to exclude such ancillary activities from calculations of the rate of return on *total investment* in cable plant. Mitchell should exclude a *pro rata* share of the capital base from his more narrow calculation of "profitability" or alternatively, include the net revenues to be expected from these new services. To do otherwise would be tantamount to assigning all of the profits from cable operations to leased channels or to pay-television services while treating the retransmission of broadcast signals of "loss leaders."

While we are unable at this time to provide precise estimates of future revenue growth, we have calculated the profitability of all systems under three different assumptions about the rate of growth in revenues per subscriber:

(a) 0% per year
(b) 2% per year
(c) 4% per year

These assumptions are probably conservative in light of the potential for new cable services and the possibilities for growth in fees for traditional basic services. This range of alternatives was chosen because it illustrates the difference between Dr. Mitchell's assumption (0%) and the projections implicit in cable owners' acquisition prices for completed systems in 1971-1972. These prices reflect the anticipation that cash flow will grow at a rate equivalent to 9% in perpetuity—an anticipation which is consistent with growth in revenues per subscriber of more than 3% per year with no increases in costs.

The effect of allowing revenues per subscriber to grow at 4% per year is considerable. On the average, this growth rate leads to an increase of 9 percentage points in the annual rate of return available to system owners. A more modest 2% growth rate increases the estimated rates of return by approximately 5 percentage points.

4. OWNER'S EXPECTATIONS OF CABLE PROFITABILITY

Perhaps the most dramatic evidence that Dr. Mitchell's profitability projections are too low comes once again from the cable television industry. In 1971–1972, a number of these firms were engaged in an active policy of acquiring existing cable systems at prices which averaged $325 per subscriber at maturity. Since the reproduction costs of these systems is usually less than $200 per subscriber, at least $125 of the $325 purchase price must reflect anticipated profits in excess of the cost of capital.

There appears to be some evidence that the rate of return before taxes required for the construction of cable systems is 15% per annum (although Mitchell states that returns in the range of 9% to 13% are likely to attract equity investors). Mitchell projects rates of return of less than 15% for all but large systems outside the top 100 markets. Even in these markets, he predicts that systems of 10,000 subscribers will realize only 13.6 to 17.0%. But the terms under which the average system was purchased in 1971–72 reflect expectations of at least a 20% annual return on capital before taxes. It is quite clear from this evidence—the price knowledgable buyers were willing to pay in the market place—that the industry members do not believe Dr. Mitchell's low estimates of profitability.

5. NEW SYSTEMS AND FRANCHISES IN THE TOP 100 MARKETS

Much of the NCTA testimony centers on Dr. Mitchell's projections for the top 100 markets. It is his prediction that systems in the center of the top 100 markets will earn a rate of return of 2.4 to 10.4% per annum before taxes even without copyright payments. Clearly, if he is correct, there will be no construction of cable systems in the top 100 markets with or without copyright fee payments.

Surprisingly, however, there has been considerable activity in the center of the top 100 markets. Between 1970 and 1972, the number of franchise applications in the central cities of the top 100 markets increased from an average of 1.5 per city to nearly 3.0. In Chicago, 17 applications were pending in 1972. In Milwaukee, 14 were outstanding while in Portland, Maine, 13 were pending. In three other cities, 10 separate franchise applications had been received by municipal authorities. Since the beginning of 1973 another 10 franchise applications have been received by the regulatory authorities in the central cities of the top 100 markets.

Despite the freeze on imported signals in the top 100 markets until early 1972, 22 new systems began construction in the central cities of the top 100 markets between 1970 and 1972. The new cable rules enunciated by the FCC in 1972 should allow other franchise holders to begin construction once the municipal and FCC administrative processes are completed.

This strong evidence of investor optimism in even the center of the top 100 markets is hardly consistent with Dr. Mitchell's projections of low profitability for these systems. Once again, we conclude that the cable television industry does not accept Dr. Mitchell's conclusions and that its members believe that the future is bright for cable investment in even those areas with three or more strong local signals.

6. EFFECTS OF THE DEFINITION OF A CABLE TELEVISION SYSTEM

The definition employed for a cable television system in S. 1361 could have a substantial effect upon the magnitudes of copyright fees paid, and the Subcommittee should be aware of these effects.

Under the informal definition which has been used by the cable television industry since its inception, and employed by the NCTA as well as by statistical services such as the *Television Factbook* and others, a cable system has been considered as being under single ownership, generally having a single head end, and operating over a contiguous geographic area. The discussions held heretofore between copyright owners, representatives of the cable industry, the Subcommittee staff, and others, have been in terms of this definition. The economic analysis peerformed, including that by Mitchell, has also employed this definition.

In his testimony on August 1, however, Mr. Foster proposed an alternative definition as follows. "A 'cable system' is any facility providing a cable service which in whole or in part receives signals transmitted by one or more broadcast stations licensed by the Federal Communications Commission and simultaneously distributes them by wire or cable or radio to subscribing members of the public within a *political subdivision within which the facility operates* (emphasis supplied)." It is the latter part of this definition which has a significant effect upon the amounts of copyright fee to be paid because many systems operate over more than one political subdivision. Thus, by the conventional industry definition, there are about 3,000 systems; but by the definition proposed by Mr. Foster, there would be about 6,000 systems—each system being split into two "systems" on the average. If the alternative definition were made operative in the bill, the effect on the amounts of copyright fee paid by the cable industry would be to reduce them by one half.

An example makes clear why this would happen. Suppose a cable system with quarterly revenues of $160,000 operated over two adjoining townships, and obtained $80,000 in revenues from each one. Under the conventional definition, this system would pay $4000 each quarter, or 2.5% of its total gross revenues. Under the alternative definition, however, this system would be viewed as two "systems," each with revenues of $80,000. Each of the "systems" would pay only $1,200 per quarter and together, they would pay $2.400 or only 1.5% of revenues.

7. THE EFFECT OF MODIFYING THE PROPOSED FEE SCHEDULE

The copyright fees proposed in S. 1361 vary from 1% to 5% of gross revenues in five discrete steps. The Chairman of the Subcommittee has requested that we analyze the effect upon cable system profitability of fees which are twice as high, i.e., which vary from 2% to 10%.

The average fee paid under the schedule proposed in S. 1361 would be nearly 2% of total cable revenues under current conditions. This average would approximately double to 4% of cable revenues if the fee schedule were increased to 2-10%. The effect upon profitability would be *de minimis* as the following excerpt from Tables E-3 to E-7 of our study demonstrates:

THE EFFECT OF MODIFYING THE PROPOSED FEE SCHEDULE

Market	Rate of return in percent before taxes with—	
	Fees specified in S. 1361 (1 to 5 percent)	Alternative copyright fee schedule (2 to 10 percent)
1 to 50:		
Middle	16.2-26.7	15.3-25.7
Edge	13.9-24.5	13.0-23.6
51 to 100:		
Middle	14.0-24.6	13.1-23.7
Edge	12.4-23.1	11.6-22.3
101 plus:		
Middle	15.8-24.7	14.9-23.8
Edge	12.7-22.0	11.8-21.2

As may be observed, the effect of doubling the fee schedule is to reduce rates of return by less than 1 percentage point. Average returns are still far in excess of the 10-15% required to attract investor capital.

8. THE AVAILABILITY OF EVIDENCE FOR THE DETERMINATION OF COPYRIGHT FEES

In his August 1 statement before the Subcommittee, Mr. Foster argued for the establishment of an initial fee schedule for compulsory copyright license for cable television systems by Congress (p 26). His major reason was that "sufficient empirical data simply does not presently exist to permit arbitrators to fairly establish an initial fee schedule" but would be available in three years when the arbitrators would convene under the proposed bill. We believe that a great deal of economic evidence presently exists or can readily be obtained, sufficient to permit arbitrators to make an informed determination as to just and reasonable fees.

The amount of financial data presently available from the cable television industry includes financial statements of hundreds of cable companies, some of them publicly held. In most cases, these companies maintain financial records by system, samples of which could be obtained under proper circumstances by an agency of the government. Some of these financial statements are available for each of more than ten years in the past. In addition, in the spring of 1972, the FCC requested detailed financial information from all cable television systems in the country (via their form 326). This included not only profit and loss statements *by system*, but also much other data which could be of use to the arbitrators. While this data is not in the public domain because it was obtained under conditions where individual system confidentiality is to be maintained, the FCC might be persuaded that its suitable analysis under proper auspices for the purpose of determining copyright fees would be in the public interest. In addition to the above, literally dozens of economic studies have been prepared by financial analysts and consulting companies, in particular, Rand, Mitre, and the Stanford Research Institute. These can all provide the arbitrators substantial guidance.

MUSIC EDUCATORS NATIONAL CONFERENCE,
Washington, D.C., July 25, 1973.

Mr. THOMAS C. BRENNAN,
Chief Counsel, Subcommittee on Patents, Trademarks and Copyrights, U.S. Senate, Washington, D.C.

DEAR MR. BRENNAN: At the request of Leonard Feist, Executive Vice President of the National Music Publishers' Association, we are sending you the following actions taken by the National Executive Board of the Music Educators National Conference at their recent meeting here in Washington:

"It was moved by Baird, seconded by Klotman and carried unanimously that the MENC National Executive Board establishes as the policy of the Music Educators National Conference that the Copyright Law shall be observed and that improper and unauthorized use of music and other printed materials protected under that law shall be prohibited in all Conference activities. Further, all MENC national and state affiliates are urged to adopt a similar position as official policy.

"It was moved by Benner, seconded by Baird and carried unanimously that the MENC National Executive Board directs that official MENC policy on the use of copyrighted materials be implemented in the following ways:

(1) When a director accepts an invitation to appear on a convention program he shall sign a declaration stating that he has read the MENC policy and will not use unauthorized copies of copyrighted materials.

(2) Any participant in a MENC program violating this policy position will be subject to suspension from the program.

(3) The action of the National Executive Board shall be communicated as a matter of general information to all participants in MENC-sponsored activities."

This demonstrates the concern of our officers for educating the membership to have respect for the Copyright Law. At the same time we would like to reaffirm our interest in having new legislation which would make it easier for teachers to understand what they can do with copyrighted materials as they pursue their professional charge of educating children.

Cordially yours,

CHARLES L. GARY,
Executive Secretary.

STATEMENT ON S. 1361 ON BEHALF OF THE MUSIC EDUCATORS NATIONAL CONFERENCE

The Music Educators National Conference has followed the struggle for new copyright legislation with great interest for the past 10 years. Members of the organization testified at earlier hearings and were a part of the "summit meeting" in the office of the Register of Copyrights at which the compromise on "fair use" which led to section 107 in the present Senate Bill 1361 was reached. MENC has participated regularly in the deliberations of the Ad Hoc Committee of Educational Organizations on Copyright Legislation. At the same time it has maintained friendly relations with the music publishing industry and has acted to protect the interests of that group with the MENC membership. A recent action of the MENC National Executive Board designed to enforce obedience to the present copyright law during all MENC sponsored events has been sent to the office of the subcommittee's chairman.

It is the position of the MENC that new copyright legislation is badly needed.

Music teachers need to know what they can and cannot do with the sophisticated means of copying printed material and sound now at their disposal. They need to be able to teach in ways that will enable them to do their best job of instructing their charges but without damaging the interests of authors and composers. The compromise represented by the fair use provisions of section 107 still seems to be a workable solution and MENC specifically endorses this section:

> Section 107. Limitations on exclusive rights: Fair use . . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by [Section 106], for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The Conference takes this position fully aware that the decision on the Williams and Wilkins case may have implications for the future development of the concept of "fair use". The possibility of this prompts the request for some disclaimer in the report that accompanies the bill in order that the understanding that existed when section 107 was conceived not be prejudiced. Without that some additional protection for the teacher, such as the Ad Hoc Committee's suggested limited educational exemption would be needed. In other words MENC is satisfied with the compromise worked out originally and anxious to see it made into law so that we can begin operating under it. We pledge our resources to helping music teachers understand it in the belief that it can be made to work to the benefit of students, composers, publishers and American musical culture generally.

MUSIC LIBRARY ASSOCIATION,
August 8, 1973.

Mr. THOMAS C. BRENNAN,
Chief Counsel, Select Committee on Patents, Trademarks and Copyright, Committee on the Judiciary, U.S. Senate, Old Senate Office Building, Washington, D.C.

DEAR MR. BRENNAN: On behalf of the Music Library Association I should like to offer a statement on the proposed general revision of the copyright law (S. 1361) and request that this statement be included in the record of the hearings which were held by Senator McClellan on July 31 and August 1, 1973.

We wish to express our concurrence with the principles of the fair use provision as presented in § 107 and § 108 of S. 1361. We are, however, concerned about the phrase "other than a musical work" (§ 108(d), line 28), by which librarians are prohibited from extending to users of printed music the privilege of obtaining a single copy of a work that is granted by that section to users of other printed materials contained in libraries. Musicologists, musicians, and music lovers should not, we believe, be denied this means of access to certain library materials which differ from other materials simply by virtue of their subject.

The copyright legislation passed by the House of Representatives in 1967 (H.R. 2512, 1st session, 90th Congress) does not contain the exclusion noted above. Circumstances relating to music in libraries and the use of such music are precisely the same now as they were during the period leading to the 1967 bill. Thus, we cannot help but observe that the phrase in the Senate bill is not in the best interests of library users.

We therefore urge that the phrase "a musical work" be deleted from S. 1361, enabling librarians to extend to users of music the rights of fair use of library materials, the same rights provided in § 108(d) to others.

Sincerely yours,

JAMES W. PRUETT, *President.*

WATTENBERG & WATTENBERG,
ATTORNEYS AND COUNSELORS,
New York, N.Y., August 10, 1973.

Mr. THOMAS C. BRENNAN,
Chief Counsel, Select Committee on Patents, Trademarks and Copyright, Committee on the Judiciary, U.S. Senate, Old Senate Office Building, Washington, D.C.

DEAR MR. BRENNAN: This is with reference to a letter dated August 8, 1973 to you on the stationery of Music Library Association, signed by James W. Pruett, President, urging deletion of the words, "a musical work" from Section 108 (d) of S. 1361 appearing on line 28, page 9 thereof.

I wrote you on December 12, 1972 concerning the same subject matter as it related to S. 644 and I attach a copy of said letter for your ready reference, it applies with equal force to S. 1361 and Mr. Pruett's letter.

In addition to the arguments made by me heretofore Mr. Pruett's misleading reference to H.R. 2512, 1st session, 90th Congress demands clarification. Section 108 as set forth in H.R. 2512 which was passed by the House of Representatives on April 11, 1967 and referred on April 12, 1967 to the Senate as an Act of the House of Representatives, formed the basis of S. 597 the companion bill to H.R. 2512. Section 108 of H.R. 2512 is as follows:

> Limitation on exclusive rights: **Reproduction of works in archival collections.**
> Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution.

This section gave a limited right to libraries to reproduce for purposes of preservation and security or for deposit for research use in any other library. This indeed was a far cry from Section 108 of S. 1361, a greatly expanded provision both as to scope and application.

Whereas 108 of H.R. 2512 had been aimed at serving libraries and researchers, the new 108 is "open to the public" and serves all users. In making such a sweeping expansive change the Senate Committee on the Judiciary correctly excluded from the application of Section 108 certain works which it deemed in its wisdom not properly includable to wit: "a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audio-visual work". It is clear that accessibility and freedom to reproduce these excluded works would not be essential to legitimate users of libraries and furthermore such works would be susceptible to economic destruction by unbridled copying.

As stated in my previous statement on the subject matter a musical composition is particularly vulnerable and should properly be excluded from Section 108.

At the hearings on July 31 and August 1, 1973 before this Committee the amendment to section 108 (d) recommended by the American Library Association restated the exclusions aforesaid and in the statement of the Ad Hoc Committee, Harold E. Wigren said "The Ad Hoc Committee is not asking for the right to copy an entire book or novel; a dictionary, reference book, musical score . . ."

Included in the 41 organizational members of the Ad Hoc Committee are Music Educators National Conference and Music Teachers National Association. If these large music organizations do not ask freedom to copy musical scores, it serves poorly for the Music Library Association to do so and its request should be rejected.

This letter is sent in multiple copies for the Subcommittee's use.

Sincerely,

PHILIP B. WATTENBERG.

WATTENBERG & WATTENBERG,
ATTORNEYS AND COUNSELORS,
New York, N.Y., December 12, 1972.

THOMAS C. BRENNAN,
Chief Counsel, Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. BRENNAN: Further to my letter of October 4, 1972 there has come to our attention ARL Newsletter No. 58 which sets forth an "Amendment to Copyright Revision Bill, S. 644 recommended by the Association of Research Libraries, American Library Association, and others" respecting Section 108(d) and states that the amendment "is being submitted to the Senate Subcommittee on Patents and Copyrights by the two associations."

Music Publishers' Association of the United States, Inc. is opposed to the said amendment and accordingly submits herewith 15 copies of an opposition statement so that each member of the Subcommittee and their staffs may be supplied a copy thereof.

Sincerely,

PHILIP B. WATTENBERG.

Enclosures.

STATEMENT OF PHILIP B. WATTENBERG, ATTORNEY FOR MUSIC PUBLISHERS' ASSOCIATION OF THE UNITED STATES, INC.

Music Publishers' Association of the United States, Inc., a trade association consisting of 47 important publishers of educational, religious and other types of music (hereinafter referred to as "MPA") has not opposed Section 108 because it expressly excludes "a musical work" from the application of such section. This exclusion, set forth in sub-section (d) of Section 108, clearly states that "The rights of reproduction and distribution under this section apply to a copy of a work, other than a musical work. . . .".

However, the subject amendment contains no such exclusion and accordingly would cause Section 108 as amended to apply to musical works. On that ground alone, MPA would oppose the subject amendment.

The exclusion of musical works from Section 108 is correct and is based upon sound reasoning which should be restated here so that such exclusion can be preserved and retained regardless of this or any other amendment to Section 108 which may be proposed:

1. A musical composition is not the type of copyright required for research and study of the serious nature involved in the Williams & Wilkins Case.

2. A musical composition is not the type of copyright that can be subdivided and dissected as is the case with medical journals, books, periodicals and compendiums of scientific writings, information and articles.

3. A musical composition in most instances when published in popular editions and arrangements for piano, various single instruments and chorus is from 2 to 6 pages in length and accordingly is easily reproduceable and vulnerable to unauthorized copying. Therefore, it requires special protection and safe-guarding.

In addition to the aforesaid grounds, the subject amendment is opposed for the following reasons:

1. Section (d)(1) would relieve the library or archives as well as the user of all responsibility to investigate the availability through commonly known trade sources of an article or other contribution to a copyrighted collection or periodical issue or "a similarly small part of any other copyrighted work". A musical composition wou'd be one such other copyrighted work and it is impractical to correlate a small part of a musical composition to an article or other contribution to a copyrighted collection or periodical issue. Any standard which would require a determination as to what is a "small part" of a musical composition is unrealistic.

2. Section (d)(2) would permit the library or archives to supply a copy of an entire musical composition without any requirement on the part of the user to establish to the satisfaction of the library or archives that an unused copy cannot be obtained through commonly known trade sources. Minus this, the likelihood of an investigation by the library or archives on its own initiative is reduced if not entirely eliminated. The section would be inequitable and unworkable.

3. Section (d) (3) is opposed on the grounds that it is meaningless. The library or archives should be required to reproduce on all authorized copies of copyrighted material supplied by it the same copyright notice as appears on the copyrighted work itself and a caption "Authorized Reproduction".

In any event this requirement should be added to Section 108.

MPA, along with National Music Publishers' Association and Music Library Association has long recognized the problem created by out-of-print copyrighted music for users and libraries. As a resu't, these organizations developed and approved a form of LIBRARY REQUISITION FOR OUT-OF-PRINT COPYRIGHTED MUSIC, copy of which is attached hereto. This form has been in use for a number of years and represents a practical approach to the problem. It is submitted that this approved method of doing business enhances the wisdom of excluding a musical work from Section 108.

Attachment.

LIBRARY REQUISITION FOR OUT-OF-PRINT COPYRIGHTED MUSIC

This form approved by Music Library Association ("MLA"), Music Publishers' Association ("MPA") and National Music Publishers' Association ("NMPA").

To ________________________________ Date ____________________
(name of publisher)

We require, for library use, the work(s) entitled:

____

____

1. If in print, please send us __________ copies of the work(s) and bill us.

2. If permanently out of print, please sign the duplicate of this form, which shall constitute permission by you to us to make or procure the making of ________ copies of the work(s), but only on the following conditons:
(a) The copyright notice shall be shown on all copies
(b) All copies shall be used for library use only.
(c) No recording use or performance for profit use or use other than library use shall be made of any copy unless such use shall be expressly licensed by you or an agent or organization acting on your behalf.
(d) We shall pay ________ for the right to copy pursuant to this permission but not otherwise.
(e) We (do) (do not) own a copying machine.
3. If any work referred to above is unpublished and available on loan to us, please advise the terms and conditions of such loan. If not available to us, please insert an X here —— and return the duplicate of this form to us promptly.
4. If any work referred to above is not in your catalog, please insert an X here ________ and return the duplicate of this form to us promptly.

Very truly yours,

Agreed to:

________________________________ ________________________________
By ______________________________ By ______________________________
(name of publisher) (name of library)

This form should be prepared in duplicate. Additional copies may be secured from MLA or MPA, 609 Fifth Avenue, N.Y., N.Y. 10017, 4th floor, or NMPA, 460 Park Avenue, N.Y., N.Y. 10022.

SUPPLEMENTARY JOINT STATEMENT ON S. 1361 OF THE NATIONAL ASSOCIATION OF BROADCASTING AND THE ASSOCIATION OF MAXIMUM SERVICE TELECASTERS

This Supplementary Statement is addressed to the modifications which the National Association of Broadcasters (NAB) and the Association of Maximum Service Telecasters (MST) believe should be made in the provisions of S. 1361 bearing upon cable television (CATV). It also considers some aspects of the oral and written statements made or submitted by representatives of cable interests before this Subcommittee on August 1, 1973. Finally, as indicated in the statement of NAB President Vincent T. Wasilewski at the August 1 hearing, it deals with the question of copyright liability for cable retransmission of sporting events, as to which broadcasters were not requested to testify on August 1.

In introducing S. 1361 in March of this year, Senator McClellan noted that the CATV provisions would have to be revised in the light of events that have occurred since the bill was originally drafted in 1969. Those events include, most notably, two critical developments. The first was the November 1971 Consensus Agreement (Appendix A), which broke the impasse among broadcasters, cable interests, and copyright owners over CATV copyright and other matters relating to cable television. The second was the implementation of all of the Consensus except the copyright aspects in the form of new cable regulations adopted by the Federal Communications Commission in February, 1972, which terminated the freeze on CATV development and established the conditions for expansion of CATV throughout the country. This second development provided the CATV interests, but not the broadcasters or the copyright owners, with the principal benefits promised them by the Consensus.

Although the Consensus Agreement was generally more favorable to CATV than to broadcasters or copyright owners, all the parties who accepted it compromised deeply entrenched positions as to the extent and terms of the copyright liability of cable systems and as to the regulatory conditions under which such systems should be permitted to operate. The Consensus provided that the parties would support legislation implementing its provisions relating to copyright, and the Federal Communications Commission promptly implemented the regulatory provisions in the expectation that implementation of the copyright provisions would follow.

It is clear that the Commission adopted the Consensus specifically because of the copyright provisions. It promulgated its cable regulations conforming to the Consensus only after its Chairman had solicited and received the advice of Senator McClellan, as Chairman of this Subcommittee, that FCC implementation of the regulatory provisions of the Consensus would "markedly facilitate passage of copyright legislation," and that the entire Consensus was, in his view, "in the public interest and . . . a reasonable compromise of the positions of the various parties." (Appendix B). On the strength of this assurance from Senator McClellan, the Commission then concluded that its adoption of the Consensus would "markedly serve the public interest."

Having agreed to the Consensus, NAB and MST support enactment of the copyright legislation contemplated by that Agreement, although our support depends on the implementation of the entire compromise. Adhering to the spirit of the Consensus as well as to the letter, we have joined with the copyright owners in drafting revisions of Section 111 and certain other provisions of S. 1361 which would achieve this result. A copy of the Revised Text we propose is attached as Appendix C. Ever since the Consensus was agreed to, NAB and MST have tried repeatedly to induce the National Cable Television Association (NCTA), which formally accepted the Consensus on the same day as the NAB, to join them in this effort, but NCTA has consistently refused.

Our Revised Text does not afford either broadcasters or copyright owners the full protection to which we believe they are entitled. In particular, the grant of broad compulsory copyright licenses for CATV restransmission of the signals and programs of broadcasters gives cable systems an unfair competitive advantage over broadcasters and an unfair bargaining advantage in dealing with copyright owners; in effect, it also provides them with a subsidy out of the pockets of copyright owners and competing broadcasters in the form of lower fees than they would pay if they had to bargain for a license. The exemption from normal copyright liability conferred upon small cable systems, of course, is a straight subsidy payable to such systems out of the same pockets. In addition, under the compulsory license granted by the Consensus, copyright owners and broadcasters will enjoy substantially less exclusivity protection in markets below the top 50 than they could ordinarily expect vis-a-vis other broadcast stations. We are nonetheless supporting these and other unfavorable provisions of the Consensus Agreement because we solemnly undertook to do so, and because in so undertaking we were assured of comparable support from NCTA for the critical copyright protections provided elsewhere in the Consensus.

We recognize that Congress is not bound by the copyright terms of the Consensus, any more than the FCC was bound to adopt its regulatory provisions. Nonetheless, prior to the Consensus the Chairman of this Subcommittee repeatedly urged the parties to seek a compromise over the intractable copyright issues which had long delayed enactment of copyright revision legislation. The Chairman and the FCC have emphasized that the compromise actually negotiated is reasonable and in the public interest. The FCC acted in reliance on the Consensus in issuing its 1972 cable regulations. In these circumstances, failure to implement the copyright provisions of the Consensus could only encourage abuse of the legislative and administrative processes by future participants, and implementation of the copyright provisions of the Consensus is the appropriate means to serve the public interest.

THE CONSENSUS COMPROMISES

The Consensus Agreement was to have ended years of conflict over a variety of issues relating to CATV copyright liability, including such basic questions as whether cable retransmission should be given the extraordinary privilege of a compulsory copyright license and what protections should be provided for broadcast stations, with which cable competes but on which it must also rely for the bulk of the programs it supplies.

As the Court of Appeals recently held in *Columbia Broadcasting Systems, Inc. v. TelePrompTer Corp.*, ______ F.2d ______ (2d Cir., Docket No. 72–1809, March 8, 1973), cable systems are subject to copyright liability under present copyright laws when they retransmit distant signals which could not be taken off the air by a local antenna without the aid of microwave relays. Except in localities where there are peculiar difficulties in receiving local signals, the importation of such distant signals via microwave is the principal service provided by CATV to its subscribers. Nonetheless, although cable systems have been spreading rapidly, they have yet to pay copyright owners anything for the programs they retransmit.

Present law aside, cable systems have in the past argued that they should be exempt from copyright liability because copyright owners are fully reimbursed by broadcasters for the use of programs retransmitted by cable. Even if this were true, it is not clear why profit-making cable systems should be given a free ride at broadcasters' expense instead of paying their share of copyright costs. But the truth is that the importation of distant signals to compete with the signals of local broadcasters does not leave intact the revenues of either broadcasters or copyright owners. The proliferation of distant signals in a local market fragments the local audience, thus reducing the advertising revenues of local broadcasters and in consequence the amount of the copyright fees they can pay. This revenue loss is not offset by increased revenues to the broadcasters whose signals are carried by cable to distant markets, because such fragmental increases in a broadcaster's audience in the form of distant viewers cannot ordinarily be sold to advertisers. Local advertisers obviously have no interest in paying to have their messages transmitted to distant markets, and national advertisers have consistently found it uneconomic to sell in a market through retransmission of distant signals. Clear channel radio stations, for example, which can be heard at night over all or most of the United States, cannot sell their distant audiences to advertisers to any significant degree, and the scattered pockets of distant audiences gained through cable are even less appealing.[1]

Indeed, one of the two principal audience rating services, on which advertising rates are based, does not even attempt to report the size of distant audiences acquired through cable. Thus, it is clear that under an equitable copyright system designed to encourage program creativity, cable should pay its way like other users.

Cable interests have also earnestly contended that even if they must pay something, they should not have to bargain for copyrights as broadcasters must do. They have argued that a cable system cannot possibly identify and then negotiate with the copyright owners of each of the multitude of programs it carries. These difficulties, it is is fair to say, have been exaggerated out of all proportion to their actual substance. The necessary information as to copyright owners can be obtained from the networks and the stations whose signals are carried. And the number of copyright owners of television programs carried by a typical cable system is in fact relatively small. The stations that are carried, the networks, several major film producers, and a relatively small number of distributors account for the great bulk of copyright program material. Nothing prevents cable systems from negotiating schedules of rates for all available combinations of programs offered by each of these owners, with the aid of a common NCTA negotiating office if necessary, and then simply determining from the schedules the amount of the fees that are due on the basis of the programs actually retransmitted. The music publishers, through ASCAP, have worked out such a solution for dealing with the difficulties they confronted in negotiating copyright licenses for countless renditions of their innumerable musical compositions. The free market has a way of generating a solution to such problems in the absence of legislative intervention.

Another issue with respect to CATV retransmission copyright liability has been the extent of the exclusivity rights which broadcasters and copyright owners may enforce against cable systems. A critical term of any copyright license is the extent to which it protects a licensee from competing displays of the same performance or work. Broadcasters and owners commonly negotiate exclusivity rights protecting the licensee against the broadcast of a licensed program by another broadcast station in the same market within a specified time of the licensee's own broadcast. It has consistently been the position of broadcasters and owners that they should be entitled to the same freedom to negotiate exclusivity rights against competing transmissions by a cable system importing a distant signal as they have against competing transmissions by other local broadcast stations. Responsible cable spokesmen, including NCTA, have generally conceded that cable systems should be subject to some exclusivity, but they have contended that the permissible degree of exclusivity should be sharply circumscribed.

These and other issues were compromised in the Consensus Agreement. The principal terms of the compromise were these:

Large cable systems would be subject to copy-right liabiilty, but small systems, i.e., independently owned systems with fewer than 3500 subscribers, would be exempt from payment of copyright fees.

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[1] It is possible that at some time in the future the importation of distant signals will lead in a few cases to emergence of powerful independent stations in major markets such as New York and Los Angeles, which will be so widely carried on cable systems that, like national networks, they will be able to sell a portion of their distant audiences to advertisers, and copyright owners will be able to share in their added revenues. If so, the loss of revenues to copyright owners on account of cable competition might be reduced to some extent, but there would still be a large net loss, and the consequences for most broadcasters, for local broadcasting generally, and for the public would be highly injurious.

—All cable systems would receive a *compulsory* copyright license for signals and programs carried in compliance with the regulatory provisions of the Consensus, which were adopted in the form of the FCC's 1972 cable regulations, including those relating to such matters as number of signals, mileage zones, and leapfrogging. Bus cable systems would have to bargain like everyone else for copyright licenses to programs taken from any additional or nonconforming signals which the FCC might subsequently permit them to carry. And the fees to be paid under the compulsory license would be determined by arbitration in the absence of agreement among the parties.

—Broadcasters would enjoy exclusively rights for non-network programming only in the major television markets, and their rights would be limited even there in markets below the top 50.[2] For network programs, broadcasters would receive a narrow nonduplication right. The copyright law would provide broadcasters with machinery to enforce their exclusivity rights in the courts.

THE PROPOSED REVISIONS IN S. 1361

The Revised Text of the cable provisions of S. 1361 attached as Appendix C faithfully adheres to the terms of the 1971 Consensus, including those that are unfavorable to broadcasters and copyright owners. The principal changes from the present text of S. 1361 are summarized below.

1. *Compulsory License.*—Section 111(c)(1)(C) of the Revised Text confers a compulsory copyright license on cable systems wherever the signals carried are contemplated by and consistent with the FCC Rules of February 12, 1972, implementing the Consensus. These Rules authorize a cable system to carry all local signals and all signals that are "significantly viewed" locally; a full complement of the television networks; a quota of distant independent station signals depending on the size of the television market in which the system is located, provided that under the so-called "leapfrogging" provisions signals imported from any of the top 25 markets must come from one of the two closest such markets; and all "grandfathered signals"—*i.e.*, all signals not otherwise authorized which were lawfully carried by the system prior to March 31, 1972. The Rules also establish exclusively rights whereby local television stations may protect themselves against *simultaneous* carriage of their network programs on imported distant signals (with special relief for time-zone problems), and in some markets against repetition of their non-network programs on distant signals imported by cable within periods of time that vary according to the size of the television market. Under the Revised Text, the compulsory license would cover all signals authorized by the 1972 Rules if carried in compliance with the exclusively provisions.

2. *Limitations on Scope of Compulsory License.*—Conversely, Section 111(c)(2)(A) of the Revised Text provides that cable retransmissions are subject to full normal copyright liability whenever they are inconsistent with or in excess of those contemplated by the 1972 Rules. This provision ensures that the compulsory license conferred on cable systems does not delegate to the FCC the power in effect to revise the copyright law whenever a majority of the Commission concludes that its rules concerning CATV should be altered. The limitations thus imposed on the scope of the compulsory license are not regulatory in nature. They do not affect the Commission's freedom to regulate. To the contrary, they ensure that the exercise of the Commission's unfettered regulatory power will not have the incidental legislative effect of modifying the copyright treatment prescribed by Congress.

Thus, future FCC regulations might permit cable systems to carry station signals or programs as to which carriage is not permitted under the 1972 Cable Rules. In that event, cable systems would be free to carry the additional or different signals or programs, but they would have to obtain a copyright license like any other user. Whatever justification there may be for a compulsory license for the bulk of a system's programs in terms of the alleged burden of multiple negotiations, it is clear that negotiating copyright licenses for a signal or programs in addition to those now authorized would not impose a burden requiring the special privilege of a compulsory license. NCTA recognized as much when it accepted the Consensus limitations on the scope of the compulsory license.

Authorization for carriage of additional signals or programs could result from changes in a variety of different Commission Rules, including (a) those which specify what signals may be carried by stations in various categories of television markets, and those which locate and categorize specific television markets (Subpart D of the 1972 Rules); (b) those defining the programs as to which broad- various definitions of terms employed in the above-mentioned Rules (Section cast television stations may claim exclusivity rights (Subpart E); and (c) various definitions of terms employed in the above-mentioned Rules (Section 76.5 (a), (f), (g), (h), (i), and (o) through (u)). For example, the Commission might directly authorize the carriage of an additional distant signal by stations in a particular market category. Or it might authorize an additional signal by changing the category of a particular market or the definition of a market category, by expanding the 35 mile zone which determines what signals are subject to carriage as local signals, or by changing the definition of the signals that must be carried as "significantly viewed." Or the Commission might change its "leapfrogging" rules so as to permit carriage of signals from markets not now authorized. Similarly, by changes in the CATV exclusivity rules or the definitions on which they depend, cable systems might be authorized to carry individual programs as to which a valid exclusivity claim might otherwise have been asserted. For all such signals or programs not authorized under the present rules, Section 111(c)(2)(A) simply provides that the *compulsory* copyright license will not apply.

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[2] NAB and MST offered to reduce the scope of the exclusivity rights in the largest markets in exchange for some protection, or less restricted protection, in smaller markets, but the cable interests refused.

3. *Arbitration of Fee Disputes.*—As contemplated by the Consensus, Section 111(d)(2)(B) of the Revised Text establishes a mechanism for the arbitration of disputes over the amount of fees to be paid pursuant to a compulsory license if the parties cannot agree. We believe that this provision would result in fee levels lower than those that would prevail under free market conditions, where the copyright owner has the option of simply refusing to sell at an unsatisfactory price. Nonetheless, it would mitigate the bargaining disadvantage imposed by the compulsory owners by enabling him to seek fees which a neutral expert body would regard as just and reasonable.

The arbitration provision replaces the schedule of fees between 1% and 5% of gross receipts that would be imposed by statute for the first three years under S. 1361 as written. As the NCTA representatives who testified before this Subcommittee on August 1 expressly recognized, this fee schedule is necessarily arbitrary, since no Congressional hearings or studies have been conducted on the appropriate fee levels for cable systems and since the questions involved are both novel and complex.

NCTA asserts that it prefers an arbitrary statutory solution because too much time will be required for an arbitral tribunal to acquire and analyze the data necessary to a reasoned conclusion. The Revised Text meets this objection by simply relieving cable systems of fee obligations for as much as another year after enactment of the legislation, if it takes that long for the tribunal to render its decision, and by providing that, if the tribunal takes longer than a year, its decision will be applied retroactively beginning 12 months after the date of enactment. NCTA's lame contention that such a delay in determining the amount of the copyright liability would prevent cable systems from obtaining needed bank financing flies in the face of both common sense and cable experience. The experience is that a number of cable systems have received substantial bank commitments in the short time since the *TelePrompTer* decision specifically established their liability under present copyright law; indeed, TelePrompTer itself has obtained a credit of $150 million from a group of banks headed by First National Bank of Boston. (*Cable News*, May 28, 1973.) The common sense is that, if banks would withhold funds because of uncertainties as to the amount of copyright liability, the problem will not be solved by fixing a schedule for only the first three years of copyright liability, since cable systems need and seek loans for much longer terms than three years and since cable representatives insist that the amount of the fees initially fixed by statute would not be taken as relevant in determining what fees are just and reasonable thereafter.

It is not surprising that cable interests prefer the extremely low fee levels proposed in S. 1361 to just and reasonable fees determined in the most objective possible way, but they agreed to forego this exceptionally favorable treatment in favor of arbitration. The appropriateness of arbitration in the event of the parties' failure to agree is hardly diminished, as the NCTA witnesses before this Subcommittee curiously implied, by the fact that the parties have indeed failed to agree on fee amounts.

4. *Exemption for Small CATV Systems.*—Section 111(d)(2)(C) provides an exemption from fee liability under the compulsory license for cable systems serv-

ing less than 3500 subscribers which were in lawful operation prior to March 31, 1972, provided that they are not under common ownership or control with other cable systems serving in the aggregate more than 3500 subscribers. This provision honors the commitment of broadcasters and copyright owners to support such an exemption. It affords full protection for the dwindling number of so-called "mom and pop" cable systems which are not controlled by large multiple system operators, whose needs are regularly invoked by NCTA representatives to substantiate hardship pleas for the cable industry as a whole.[5]

In this connection it should be noted that the prepared testimony of Mr. George Barco on behalf of cable interests submitted to this Subcommittee as of August 1, which appears to spurn the benefit of this exemption, in fact claims the exemption in a different form. Barco proposes that, in lieu of the exemption for systems with fewer than 3500 suberibers, there should be an exemption for all systems for the first $200,000 of annual gross receipts. Note that a system with 3500 subscribers charging a fee of $5 per month would have annual gross receipts of just over $200,000. There are two significant differences between the Barco proposal and the Consensus exemption. The first is that the Barco proposal would provide a wholly unjustified windfall exemption to every cable system in the country with *more than* 3500 subscribers. The second is that an exemption defined in Mr. Barco's way enables him to avoid relying expressly on the Consensus as the basis for claiming the exemption.

5. *Exclusivity vis-a-vis Signals and Programs Not Authorized Under Present Rules.*—As indicated above, the Commission's Rules limit the exclusivity rights which broadcasters can negotiate with copyright owners and then assert against cable retransmissions covered by the compulsory license. Section 111(e) of the Revised Text provides that, if the FCC should authorize carriage of signals or programs not subject to compulsory copyright license, it will not restrict the broadcasters' exclusivity rights vis-a-vis such cable retransmissions to any greater extent than it restricts their exclusivity rights vis-a-vis other television broadcast stations. This provision implements an express term of the Consensus and preserves the basic principle of the Consensus that privileged treatment for cable systems in matters that are essentially of a copyright nature should not extend to signals or programs not authorized under the 1972 Rules. Section 111 (e) makes clear that this assurance as to treatment under the copyright law in no way limits or preempts the FCC's statutory authority to regulate the operations of broadcast stations or cable systems pursuant to any other Act of Congress.

6. *Right of Enforcement.*—The Revised Text also adds a new subsection to Section 501 of S. 1361 to provide that television broadcasters will have the same rights of judicial enforcement as copyright owners with respect to actionable infringements of copyright resulting from a cable retransmission within the broadcaster's local service area. This provision also implements an express term of the Consensus. Its effect is simply to ensure that broadcasters, like copyright owners, will have effective judicial remedies to enforce such copyright protections vis-a-vis cable systems as remain to them under the Consensus. This provision is of particular importance in the enforcement of exclusivity terms of copyright licenses, as to which it is the broadcaster rather than the copyright owner which has the primary interest in enforcement or the practical ability to enforce.

THE CONSENSUS SHOULD BE IMPLEMENTED

In their testimony before this Subcommittee on August 1, NCTA officials appeared to be trying to back away from their commitment to support copyright legislation implementing the Consensus Agreement. They pressed for enactment of the statutory fee schedule contained in S. 1361 rather than the arbitration provisions they had agreed to support in its place. They did not affirmatively support a modification of Section 111 to establish the limitations on the scope of the compulsory license which were the heart of the Consensus Agreement. And they proposed revisions of their own in S. 1361 which are inconsistent with the Consensus. (NCTA's proposed revisions are discussed in Appendix D.)

Cable interests have already obtained the benefit of the regulatory provisions of the Consensus in the form of the FCC Rules ending the freeze on CATV and authorizing cable systems to import new distant signals. At last count a total of 1,104 cable systems have been granted certificates of compliance with the 1972 Rules, including 400 new systems. (*Cable News*, July 30, 1973.) The FCC accorded cable interests these early benefits, with the support of broadcasters and copyright owners, in reliance on NCTA's promise that it would support implementation of the rest of the Consensus. The time has come for NCTA to make good on that pledge.

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[5] The Consensus further protects the "mom and pop" systems through the "grandfather" provision which exempts all cable systems lawfully operating on Mar. 31, 1972, from the obligation to respect exclusivity rights. Most of the "mom and pop" systems established or likely to be established were in operation before 1972.

We find it difficult to believe that a responsible organization would renege on such a pledge under these circumstances. Indeed, in their testimony before this Subcommittee its officers offered scarcely a figleaf of justification for their apparent retreat from the Consensus. When NCTA President Foster was asked about the Consensus by the Chairman, he said NCTA's position was that the Consensus had been useful to get the parties off dead center, but now that its purpose had been served, the parties had "moved beyond the Consensus." This response sounded very much as if he were simply saying that NCTA had already gotten what it wanted from the Consensus, and so had no reason to honor it.

NCTA's difficulties in finding a tenable rationalization for a retreat from the Consensus is also apparent in the testimony of NCTA National Chairman Hostetter. He acknowledged that the question concerning the Consensus had not been adequately dealt with in President Foster's testimony. But his explanation was that NCTA had never liked the Consensus and had accepted it only under extreme pressure. In fact, as with most compromises, none of the parties was pleased with the Consensus; but once they reluctantly agreed to it, the other parties kept their word. Cable interests have not hesitated to invoke the Consensus when it has served their purposes. They invoked it aggressively in connection with the FCC proceedings leading to the adoption of the 1972 Rules. Indeed they invoked it only a few weeks ago, in a Statement of Position on S. 1361 circulated to their members, in support of their claim to an exemption for cable systems with fewer than 3500 subscribers.

The justifications for attempting to back away from the Consensus suggested half-heartedly in President Foster's prepared testimony on August 1 only underline the flimsiness of the available pretexts. Mr. Foster says that "major broadcast interests" such as CBS and a television station in Las Vegas did not abide by the Consensus, without mentioning that those "interests" were not parties to the Consensus (or that their opposition was in fact unavailing). He says that "to the best of our knowledge" the FCC's position is still the pre-Consensus position stated in a letter from Chairman Burch to Senator Pastore of March 11, 1970, without mentioning either the letter of Chairman Burch to Senator McClellan of January 26, 1972, endorsing the Consensus, or the Commission's own explicit endorsement of the Consensus in adopting the 1972 cable regulations. And he says, contrary to the fact, that the FCC "did not adopt rules which comported in all respects" with the Consensus. His sole illustration of this unsupportable proposition is a provision in the network exclusivity rules for special relief to broadcasters in the smaller markets of the Rocky Mountain time zone, where the Commission concluded that the simultaneous exclusivity rule is uniquely ineffective to protect a station's network programming, because prime time viewing hours do not coincide with any network feed of prime time programs and many stations therefore broadcast these programs on a delayed basis or out of sequence. Far from being inconsistent with the Consensus, this provision implements an express term of the Consensus calling for "special relief for time-zone problems" from the rule of simultaneous-only exclusivity for network programming.

COPYRIGHT LIABILITY FOR IMPORTED SPORTS PROGRAMS

In testimony before this Subcommittee, NCTA argued strenuously for deletion of Section 111(c)(4)(B) of S. 1361, a provision which is not treated one way or the other by the Consensus. That provision subjects to normal copyright liability a cable retransmission of a professional athletic contest carried on a distant signal into the local service area of television broadcast stations none of which has received permission to broadcast the contest. NAB and MST support retention of this provision as written, and have accordingly included it in the Revised Text as Section 111(c)(2)(B).

Contrary to the repeated assertions of NCTA witnesses, the sports provision does not impose a "black-out" of sports contests. It simply requires cable systems to negotiate for copyright licenses to retransmit a professional athletic event if the local television broadcast stations with which they compete have not been authorized to broadcast the event. There can be no argument that cable systems need a compulsory license for such individual sporting events because of any burden of identifying or negotiating with the copyright owners. Any different treatment of cable systems from the treatment accorded broadcast stations in this respect would be grossly discriminatory against television broadcast stations. Moreover, it would effectively destroy the ability of athletic teams to assure the continued availability to the viewing public of games of special local or regional interest over free television broadcast stations. This result is not in the public interest.

Professional sports are now televised in great variety throughout the United States. This variety is made possible by the broadcast of different games in different areas of the country. In sports such as football, baseball, basketball, and hockey, each area of the country receives one or two games at a particular broadcast time, but the total number of games broadcast throughout the country at that time may be quite large. If CATV retransmits all these games into a particular local market at once, the resulting fragmentation of the local audience would destroy the market for broadcast of the local team's games unless the team or a particular contest happened to have great attraction for a national audience. The foreseeable result of granting cable systems a compulsory license to import broadcast signals of distant games which are not sold to local broadcasters, would be to reduce the number of games broadcast in the various regions of the country in favor of a few selected national games. The revenues of local teams would suffer as a result, and local audiences would be deprived of the opportunity to see games of teams with particular local or regional appeal. Even if Congress should conclude that this is a desirable result, it would be inappropriate to implement such a policy by granting special copyright privileges to cable systems and permitting them to subvert limits on the transmission of distant games still imposed on broadcasters.

Indeed, there is much to be said for the proposition that cable systems should be *prohibited* from carrying any football, baseball, basketball, or hockey game that has not been offered to a free television broadcasting station in the same market. However, this is a question of regulatory policy, not a copyright question, and accordingly we do not contend that it should be reflected in S. 1361. But since there is no conceivable justification for granting cable systems a *compulsory* license to carry such games, the copyright bill should include a provision denying cable systems such preferential copyright treatment.

[APPENDIX A]

CONSENSUS AGREEMENT

FULL TEXT OF THE CONSENSUS AGREEMENT ACCEPTED BY REPRESENTATIVES OF BROADCASTERS, COPYRIGHT OWNERS, AND CABLE SYSTEMS IN NOVEMBER 1971

Local signals.—Local signals defined as proposed by the FCC, except that the significant viewing standard to be applied to "out-of-market" independent stations in overlapping market situations would be a viewing hour share of at least 2% and a net weekly circulation of at least 5%.

Distant signals.—No change from what the FCC has proposed.

Exclusivity for nonnetwork programing (against distant signals only).—A series shall be treated as a unit for all exclusivity purposes.

The burden will be upon the copyright owner or upon the broadcaster to notify cable systems of the right to protection in these circumstances.

A. Markets 1–50.

A 12-month pre-sale period running from the date when a program in syndication is first sold any place in the U.S., plus run-of-contract exclusivity where exclusivity is written into the contract between the station and the program supplier (existing contracts will be presumed to be exclusive).

B. Markets 51–100.

For syndicated programing which has had no previous non-network broadcast showing in the market, the following contractual exclusivity will be allowed:

(1) For off-network series, commencing with first showing until first run completed, but no longer than one year.

(2) For first-run syndicated series, commencing with first showing and for two years thereafter.

(3) For feature films and first-run, non-series syndicated programs, commencing with availability date and for two years thereafter.

(4) For other programing, commencing with purchase and until day after first run, but no longer than one year.

Provided, however, that no exclusivity protection would be afforded against a program imported by a cable system during prime time unless the local station is running or will run that program during prime time.

Existing contracts will be presumed to be exclusive. No preclearance in these markets.

C. Smaller Markets.

No change in the FCC proposals.

Exclusivity for network programing.—The same-day exclusivity now provided for network programing would be reduced to simultaneous exclusivity (with special relief for time-zone problems) to be provided in all markets.

Leapfrogging.—(A) For each of the first two signals imported, no restriction on point of origin, except that if it is taken from the top-25 markets it must be from one of the two closest such markets. Whenever a CATV system must black out programing from a distant top-25 market station whose signals it normally carries, it may substitute any distant signals without restriction.

(B) For the third signal, the UHF priority, as set forth in the FCC's letter of August 5, 1971, p. 16.

Copyright legislation.—(A) All parties would agree to support separate CATV copyright legislation as described below, and to seek its early passage.

(B) Liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3500 subscribers. As against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the Commission may allow.

(C) Compulsory licenses would be granted for all local signals as defined by the FCC, and additionally for those distant signals defined and authorized under the FCC's initial package and those signals grandfathered when the initial package goes into effect. The FCC would retain the power to authorize additional distant signals for CATV carriage; there would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings.

(D) Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.

(E) Broadcasters, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

Radio carriage.—When a CATV system carries a signal from an AM or FM radio station licensed to a community beyond a 35-mile radius of the system, it must, on request, carry the signals of all local AM or FM stations, respectively.

Grandfathering.—The new requirements as to signals which may be carried are applicable only to new systems. Existing CATV systems are "grandfathered." They can thus freely expand currently offered service throughout their presently franchised areas with one exception: In the top 100 markets, if the system expands beyond discrete areas specified in FCC order (e.g., the San Diego situation), operations in the new portions must comply with the new requirements.

Grandfathering exempts from future obligations to respect copyright exclusivity agreements, but does not exempt from future liability for copyright payments.

[APPENDIX B]

EXCHANGE OF CORRESPONDENCE BETWEEN FCC CHAIRMAN BURCH AND CHAIRMAN McCLELLAN

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., January 26, 1972.

HON. JOHN L. McCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is directed to an important policy aspect of our present deliberations on a new regulatory program to facilitate the evolution of cable television. That is the matter of copyright legislation, to bring cable into the competitive television programming market in a fair and orderly way—a matter with which you as Chairman of the Subcommittee on Patents, Trademarks and Copyrights have been so deeply concerned in this and the last Congress.

You will recall that we informed the Congress, in a letter of March 11, 1970 to Chairman Magnuson, of our view that a revised copyright law should establish the pertinent broad framework and leave detailed regulation of cable television signal carriage to this administrative forum. In line with that guiding principle and a statement in our August 5, 1971 Letter of Intent that we would consider altering existing rules to afford effective non-network program protection, we are now shaping a detailed program dealing with such matters as distant signal carriage, the definition of local signals, leapfrogging, and exclusivity (both network and non-network. That program is now approaching final action.

As of course you know, representatives of the three principal industries involved—cable, broadcasters, and copyright owners—have reached a consensus agreement that deals with most of the matters mentioned above. On the basis of experience and a massive record accumulated over the past several years, we regard the provisions of the agreement to be reasonable, although we doubtless would not, in its absence, opt in its precise terms for the changes it contemplates in our August 5 proposals. But the nature of consensus is that it must hold together in its entirety or not at all—and, in my own view, this agreement on balance strongly serves the public interest because of the promise it holds for resolving the basic issue at controversy.

This brings me directly to a key policy consideration where your counsel would be most valuable. That is the effect of the consensus agreement, if incorporated in our rules, on the passage of cable copyright legislation.

The Commission has long believed that the key to cable's future is the resolution of its status vis-a-vis the television programming distribution market. It has held to this view from the time of the First Report (1965) to the present. We remain convinced that cable will not be able to bring its full benefits to the American people unless and until this fundamental issue is fairly laid to rest. An industry with cable's potential simply cannot be built on so critical an area of uncertainty.

It has also been the Commission's view, particularly in light of legislative history, that the enactment of cable copyright legislation requires the consensus of the interested parties. I note that you have often stressed this very point and called for good faith bargaining to achieve such consensus.

Thus, a primary factor in our judgment as to the course of action that would best serve the public interest is the probability that Commission implementation of the consensus agreement will, in fact, facilitate the passage of cable copyright legislation. The parties themselves pledge to work for this result.

Your advice on this issue, Mr. Chairman, would be invaluable to us as we near the end of our deliberations.

With warm personal regards,

Sincerely,

DEAN BURCH, *Chairman.*

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, TRADE-MARKS,
AND COPYRIGHTS,
Washington, D.C., January 31, 1972.

Hon. DEAN BURCH,
Chairman, Federal Communications Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of January 26, 1972, requesting my advice on the effect of the consensus agreement reached by the principal parties involved in the cable television controversy on the passage of legislation for general revision of the copyright law.

I concur in the judgment set forth in your letter that implementation of the agreement will markedly facilitate passage of such legislation. As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties.

The Chief Counsel of the Subcommittee on Patents, Trademarks and Copyrights in a letter of December 15, 1971 has notified all the parties that it is the intention of the Subcommittee to immediately resume active consideration of the copyright legislation upon the implementation of the Commission's new cable rules.

I hope that the foregoing is helpful to the Commission in its disposition of this important matter.

With kindest regards, I am

Sincerely,

JOHN L. MCCLELLAN, *Chairman.*

[APPENDIX C]

COPYRIGHT REVISION BILL

REVISED TEXT ON CABLE TELEVISION PROPOSED BY COMMITTEE OF COPYRIGHT OWNERS, NATIONAL ASSOCIATION OF BROADCASTERS, AND ASSOCIATION OF MAXIMUM SERVICE TELECASTERS

SEC. 111. Limitations on exclusive rights: Secondary transmissions

(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by a common, contract, or special carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided, That* the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmission; or

(4) the secondary transmission is not made by a cable system and is made by a governmental body, or other non-profit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

(b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP.—Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.

(c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—(1) Subject to the provisions of clause (2) of this subsection (c), secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) in the following cases:

(A) Where the signals comprising the primary transmission are exclusively aural and the secondary transmission is permissible under the rules and regulations of the Federal Communications Commission; or

(B) Where the community of the cable system is in whole or in part within the local service area of the primary transmitter; or

(C) Where the signals comprising the secondary transmission are contemplated by and consistent with section 76.5 (a), (f), (g), (h), (i), and (o) through (u) and Subparts D and F of the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252 *et seq.*, on February 12, 1972.

(2) Notwithstanding the provisions of clause (1) of this subsection (c), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the signals comprising the secondary transmission, whether or not authorized by the Federal Communications Commission, are inconsistent with, or in excess of those contemplated by, the rules and regulations of the Federal Communications Commission referred to in subclause (C) of clause (1) of this subsection (c); or

(B) Where the community of the cable system is in whole or in part within the local service area of one or more television broadcasting stations licensed by the Federal Communications Commission, and—

(i) the content of the particular transmission program consists primarily of an organized professional team sporting event occurring simultaneously with the initial fixation and primary transmission of the program; and

(ii) the secondary transmission is made for reception wholly or partly outside the local service area of the primary transmitter; and

(iii) the secondary transmission is made for reception wholly or partly within the local service area of one or more television broadcasting stations licensed by the Federal Communications Commission, none of which has received authorization to transmit said program within such area.

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of the secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it together with the name and location of the primary transmitter, or primary transmitters, and thereafter from time to time, such further information as the Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause (1).

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall during the months of January, April, and July and October, deposit with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation and furnish such further information as the Register of Copyrights may require to carry out the purposes of this clause (2)—

(9) A statement of account, covering the three months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system and the gross amounts irrespective of source received by the cable system.

(B) A total royalty fee for the period based upon a schedule or schedules to be determined as follows:

(i) Within sixty days after the enactment of this Act, the Register of Copyrights shall constitute a panel of the Copyright Royalty Tribunal in accordance with Section 803 for the purpose of fixing a schedule or schedules of just and reasonable compulsory license fees.

(ii) The schedule or schedules of compulsory license fees shall be determined by the Tribunal in a like manner as if the Tribunal were convened to make a determination concerning an adjustment of copyright royalty rates, *provided*, however, that Sections 806 and 807 shall not apply and that the determination of the Tribunal shall be effective at the end of the twelfth month after the enactment of this Act or on the date the Tribunal renders its decision, whichever occurs sooner.

(iii) The Tribunal, immediately upon making a determination, shall transmit its decision, together with the reasons therefor, to the Register of

Copyrights who shall give notice of such decision by publication in the Federal Register within fifteen days from receipt thereof. Thereafter, the determination of the Tribunal may be subject to judicial review in a like manner as provided in Section 809 but no other official or court of the United States shall have power or jurisdiction to otherwise review the Tribunal's determination.

(iv) Notwithstanding any of the provisions of the antitrust laws (as designated in § 1 of the Act of October 15, 1914, c. 323, 38 Stat. 730, Tit. 15 U.S.C. § 12; and any amendment of any such laws) owners of copyrights in different works and owners of cable systems may among themselves or jointly with each other agree on, or submit to the Copyright Tribunal for its consideration, one or more proposed schedules of compulsory license royalty fees, and proposed categories of secondary transmissions and cable systems for inclusion in any of the schedules to be established or adjusted by the Tribunal pursuant to this subsection and Section 802.

(C) The preceding subclause (B) of clause (2) of this subsection (d), shall not apply to cable systems that before March 31, 1972, were operating in accordance with the rules and regulations of the Federal Communications Commission, served less than 3,500 subscribers, and were not, directly or indirectly, by stock ownership or otherwise, under common ownership or control with any other cable systems serving in the aggregate more than 3,500 subscribers, *provided* that this exemption shall continue to apply as long as the cable system continues to serve not more than 3,500 subscribers and is not directly or indirectly, by stock ownership or otherwise, under common ownership or control with any other cable systems serving in the aggregate more than 3,500 subscribers, and *provided further*, that such cable system files annually at the Copyright Office in accordance with requirements that the Register of Copyrights shall prescribe by regulation, a statement setting forth the names and addresses of other cable systems directly or indirectly in control of, controlled by, or under common control with the cable system filing the statement, the number of subscribers served by each of such other cable systems; and the names and addresses of any person or persons who directly or indirectly own or control the cable system filing the statement and directly or indirectly own or control any other cable system or systems, and the names and addresses of the cable systems so owned or controlled. For the purposes of this subclause (C) or clause (2) of subsection (d), "subscriber" shall mean a household or business establishment, or, if a hotel, apartment house or similar establishment, it shall mean a lodging or dwelling unit within such establishment containing a television receiving set.

(3) The royalty fees deposited under clause (2) shall be subject to the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions made during the preceding twelve-month period shall file a claim with the Register of Copyrights, in accordance with requirements that the Register shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws (as designated in §1 of the act of October, 15, 1914, 38 Stat. 730, Tit. 15 U.S.C. §12, and any amendments of any such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy concerning the statement of account or the distribution of royalty fees deposited under clause (2). If he determines that no such controversy exists, he shall, after deducting his reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If he finds the existence of a controversy he shall certify to that fact and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fee by the tribunal.

(C) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(e) *Relation to Other Laws and Regulations.*—Nothing in this section shall be construed as limiting or preempting the authority of the Federal Communications Commission to regulate the operations of broadcast stations or cable systems pursuant to any other Act of Congress; *Provided that*, the Federal Communications Commission shall not limit the area, duration or other scope of the exclusivity a television broadcast station may acquire respecting secondary transmissions by cable systems that are not subject to the compulsory license provided for in subsection (c) of this Section 111 beyond any limits that may be applicable to the area, duration or other scope of the exclusivity a television broadcast station may acquire respecting other television broadcast stations.

(f) *Definitions.*—As used in this section, the following terms and their variant forms mean the following:

(1) A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

(2) A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission without change in program or other message content.

(3) A "cable system" is a facility that in whole or in part receives signals transmitted by one or more television broadcast stations licensed by the Federal Communications Commission and makes secondary transmissions of such signals by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under Subsection (d)(2)(B), two or more cable systems in contigous communities under common ownership or control or operating from one headend shall be considered as one system.

(4) The "local service area of a primary transmitter" as used in this section comprises the area in which a television broadcast station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules and regulatons of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252, *et seq.*, on February 12, 1972, or such similar rules as the Federal Communications Commission may from time to time lawfully adopt in the future in light of changed circumstances.

(5) The terms "full network station," "partial network station," "independent commercial station," and "non-commercial educational station" as used in subpart D of the rules and regulations of the Federal Communications Commission as published in Volume 37, Federal Register, page 3252, *et seq.*, on February 12, 1972, shall be defined in accordance with the rules and regulations of the Commission of the same date with such additional elaboration as the Commission may from time to time provide consistent with the intent of this Act.

(g) This section shall be effective upon the enactment of this Act.

[Add the following to section 501]

(e) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (e) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section 501 be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television broadcast station.

[Amend Section 801(b) by deleting the words "continue to be reasonable" and by substituting the words "are just and reasonable."]

[APPENDIX D]

COMMENTS OF NAB AND MST ON SPECIFIC CHANGES IN SECTION 111 OF S. 1361 PROPOSED BY NCTA

NCTA made a number of proposals for amendments of Section 111 of S. 1361 on pages 36–42 of Mr. Foster's statement of August 1, 1973. NAB and MST present the following comments with respect to these proposals.

1. NCTA proposes that Section 111(b) be eliminated, thereby making retransmission of subscription pay television programs broadcast by STV stations subject to compulsory licensing.

NCTA argues that, under Section 111(b), a CATV system would have to violate either the copyright law or the rules of the Federal Communications Commission. This is not so. Section 111(b) merely provides that preferential copyright treatment does not apply if a cable system retransmits an over-the-air pay television transmission. A CATV system wishing to retransmit such programs would simply have to bargain for them. If it cannot obtain authority to carry them, the Commission's Rules clearly would not require it to do so—assuming that the carriage provisions apply to STV programs at all.

In fact, if the Commission had intended that CATV systems could pick up scrambled STV signals, unscramble them and sell them to their subscribers, certainly it would have said so in its February 1972 decision adopting the new cable regulations. But there is not a word in the decision to suggest any such intent. Moreover, as a matter of copyright law, there is no reason why cable subscribers should be able to receive over-the-air subscription television programs without paying the STV station for them just as members of the public who receive the signals directly over the air must do. In addition, the Communist's Rules provide that television broadcast signals carried by cable must be retransmitted as received without any alteration. If a CATV system picks up a "scrambled" signal, the Commission's regulations neither require nor permit it to transmit and unscramble the signal for its subscribers. To the contrary, the rules prohibit such unscrambling.

2. NCTA proposes that Section 111(1), which provides an exemption from copyright liability for master antenna systems which serve a hotel, apartment house or similar establishment, should be eliminated because the exemption unfairly discriminates between master antenna systems and CATV systems. It is difficult to see why hotels, apartment houses or similar establishments which do no more than provide a master antenna service with respect to purely local signals for the use of their guests or residents should be subject to copyright liability. Accordingly, we support the present provision so long as it is limited to installations which do not receive and transmit the signals of non-local stations.

3. NCTA proposes that Section 111(a)(4) be eliminated in order to treat government-owned CATV systems in the same manner as privately owned CATV systems under the copyright law.

Section 111(a)(4) is limited to secondary transmissions by government bodies, or other nonprofit organizations, "without any purpose of direct or indirect commercial advantage" and without charge to recipients of the service other than assessments necessary to defray the actual and reasonable cost of maintaining and operating the service. As the legislative history of this provision shows since it was first added to proposed copyright bills at the request of the Federal Communications Commission, this provision is intended to exempt from copyright liability translator broadcast stations owned by municipal bodies or nonprofit organizations. These translators invariably serve very small communities and are typically built and operated non-commercially by localities or nonprofit groups for the purpose of providing service to remote areas which are beyond the reach of regular off-the-air television broadcast stations. NAB and MST have always supported the exemption of such translators from copyright liability.

We believe that, as the bill is now drafted, government owned *CATV* systems would typically be subject to copyright liability because they are ordinarily operated for the purpose of commercial advantage and the charges to the recipients would be more than those necessary to defray out-of-pocket expenses. Municipalities and nonprofit organizations which seek to operate CATV systems do so in order to make a profit and accordingly would not be exempt from copyright liability under Section 111(a)(4) as it is now written. However, in order to avoid any question on this score NAB and MST have no objection to adding to Section 111(a)(4) language making clear that it does not apply to cable systems. This language is included in Section 111 of the Revised Text set forth in Appendix C.

4. NCTA urges that "provisions of a regulatory nature that were the subject of the recent FCC rule-making proceeding" be eliminated. We quite agree, but there should be no misunderstanding over semantics. The Consensus provided for certain basic terms and conditions of compulsory copyright licenses for CATV.

These terms and conditions are not regulatory but rather serve to define the interface between copyright policy and regulatory policy to the extent necessary to assure that copyright policy is not inconsistent with regulatory policy and that the FCC does not modify copyright law by modifying its rules. Section 111(e) together with the other provisions of Section 111 in the Revised Text would effectuate the Consensus and would achieve the proper balance in the copyright bill.

5. As noted in the text, NCTA's repeated references to Section 111(c)(4)(C) as a sports "blackout" provision is simply inaccurate. For the reasons set forth in the text, this provision should be eliminated.

6. NCTA says that it favors the adoption of Section 111(d) as written, but suggests that systems of 3,500 subscribers or less be exempt from payment of copyright fees. Section 111(d) is to a large extent a procedural provision except that it also contains a statutory schedule of fees. Our position with respect to the statutory schedule of fees was set forth in Mr. Wasilewski's testimony before the Subcommittee on August 1 and also in the text of this supplementary statement. We support the 3,500 subscriber system exemption as contemplated by the Consensus, but only if the other portions of the Consensus are incorporated into the copyright bill. Moreover, the exemption should apply only to independently owned systems with 3,500 subscribers or less.

7. NCTA proposes to change the definitions of "primary transmission", "secondary transmission" and "cable system" in Section 111(f). To the extent that the changes in the definitions of "primary transmission" and "secondary transmission" would result in excluding translators from the coverage of Section 111 generally and imposing copyright liability on municipally owned and nonprofit privately owned translators, we oppose the changes in the definition. To the extent that NCTA's proposed changes in these three definitions would serve other purposes, it has not explained what the purposes or the consequences might be. The changes tinker with language the meaning of which is well understood and could therefore result in a confused and unsatisfactory legislative history. Accordingly, we oppose these changes until NCTA describes in detail their purpose and effect, and we reserve the right to comment further when and if this occurs.

8. NCTA proposes to amend Section 110(5) by adding the language "or (C) The transmission is made consistent with the purposes of Section 111 of this Title." Again, NCTA's explanation for the change is not especially enlightening since, as we read Section 110(5), it does not deal with exemptions for educational purposes. Nor is the proposed language itself clear. Accordingly, our position is the same as with respect to the preceding point.

9. Finally, NCTA proposes that no limitation be placed on the reception of programs by way of CATV which are not copyrighted or subject to copyright. This proposal is so general that we cannot come to grips with it at this time and reserve the right to express further views when NCTA explains its purpose and effect. As worded, it seems to be purposeless. The provisions of the bill should stand by themselves, and if NCTA has any specific provisions in mind which it believes should be changed, we submit that it should identify them so that other parties have reasonable notice as to the changes it is trying to persuade Congress to make.

STATEMENT OF NATIONAL BROADCASTING COMPANY, INC.

AUGUST 10, 1973

This Subcommittee is presently considering a proposed statutory revision of the copyright laws (S. 1361). NBC has previously commented on various aspects of the proposed statute and requests this opportunity to do so again. While there is much that can be said about such a sweeping and comprehensive change in the law, we restrict ourselves to those provisions that are of special significance to us—Section 111, dealing with cable television, and Section 114, dealing with the use and licensing of sound recordings.

We respectfully request that our statement be made a part of the record of the Subcommittee's hearings.

A. *Section 111*

Seciton 111 will affect us as an owner of copyrighted material. In a larger sense, however, it will also determine the future of cable television and its relationship to free television. The industry practices it engenders will not be easily reversed. We urge that careful deliberation be given to each of its unique features.

Free television has developed by providing a variety of entertainment, news and information programming to the public at considerable cost and risk. Thus far, cable, when not engaged in merely providing a signal amplification service, has essentially used the services of free television, picking and choosing the best, casting off the unprofitable and bearing none of the programming risks.

We view cable as a potential force to supplement the services now provided by free television. We believe that cable should be encouraged to break new ground and to develop new sources of programming that are not typically available to the public on free television. Section 111, as it is now drafted, will not further that objective. In our view, the concept of compulsory licensing that is embodied in the section will only encourage cable to continue to appropriate the services of free television.

At the outset, a crucial distinction must be made between the transmission by cable of "local" broadcast signals and "distant" signals. Cable systems that merely retransmit or amplify local signals do not necessarily affect the competitive position of local broadcasters (except, perhaps, in a few overlapping markets), television networks, or copyright owners. While benefiting cable operations, such activity expands the potential audience for a program by delivering signals which might otherwise be blocked within the originating station's broadcast area. The low rates for local transmissions that are presently proposed in Section 111 would not, therefore, be unreasonable with regard to such activity.

Cable systems that import distant signals, however, interfere unreasonably with local broadcasters, television networks and other exhibitors of copyrighted material by interjecting programming that dilutes their audience. While program diversity is desirable, cable systems engaged in this activity are not creating anything new; they are appropriating the property of others. They should, therefore, pay for the properties they use, just as broadcasters and networks must pay for them.*

". . . when a CATV system imports distant signals, it is no longer within the ambit of the Fortnightly doctrine [392 U.S. 390 (1968)], and *there is then no reason to treat it differently from any other person who, without license, displays a copyrighted work to an audience who would not otherwise receive it.* For this reason, we conclude that the CATV system is a "performer" of whatever programs from these distant signals that it distributes to its subscribers" (emphasis added).

We thus urge that the proposed Section 111 take cognizance of this distinction by providing for the minimal fees for the transmission of local signals now proposed in the statute and higher fees for the importation of distant signals.

As we have previously pointed out to this Subcommittee (see our letter to Thomas C. Brennan, dated March 13, 1972), studies by independent research organizations have indicated that distant signal importation permits cable to substantially increase its revenues and profits. Cable should pay a reasonable price for these benefits. Requiring cable to pay its fair share will also create new sources of revenue for program producers and encourage them to develop more and different programing. The costs of programing will be spread more evenly among broadcasters and cable, thus permitting both to acquire more programing. The ultimate result will be greater programing diversity.

We believe that a fair rate for cable to pay for the programing it receives by importing distant signals would be a percentage of gross revenue which, unlike the proposed statutory schedule, takes into account *the cost to television competitors* for the same material and *the incremental profits* that are generated for cable systems from carrying such programing.

We estimate that most non-network owned stations may spend as much as 42% of their broadcast revenue for programing and that the major networks may spend as much as 80%. The MPAA estimates that approximately 54.1% of broadcast revenues must be used to acquire programing. The NAB put the average at 34%. No matter which estimate is correct, it is clear that, under the proposed statute, cable would be paying a very small fraction of the payments made by free television for programing.

In terms of the increased profits that cable can anticipate from distant signal importation, it is also apparent that the proposed fee schedule is inadequate. The studies referred to in our March 13 letter show that distant signal importation would raise total cable demand from approximately 10,400,000 homes to at least

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* This position reflects what is currently the law. In *CBS* v. *Teleprompter Corp.*, 476 F. 2d 338 (2d Cir. 1973), the court ruled:

18,000,000 homes (using 1969 data as a base), or a total of at least 73%. In terms of profitability, increased subscriber revenues for a typical small system (3,800 subscribers) would, in the tenth year, increase pre-tax profits by 138%. It is interesting to note that since the FCC has permitted distant signal importation (March 1972), cable has been able to increase its total subscribers and the number of communities it serves by at least 20%.

We thus believe that the following schedule of fee payments is more realistic and equitable:

Number of subscribers:	*Percent of gross subscriber revenues for distant signal importation*
Up to 3,500	7.5
3,500-10,000	10.0
Over 10,000	12.5

This proposed schedule is much fairer than the schedule contained in the bill. It recognizes the existence of the relationship between distant signal importation and increased profits. It affords copyright owners a greater revenue base for the exploitation of their material. It is scaled in such a way that smaller cable systems will not pay as much as more profitable systems. Finally, it brings into more reasonable proportion what free television *must* pay for desirable programming and what cable *should* pay for such programming.

We estimate that the proposed charges will be less than one-half of the incremental revenues attributable to importation and an even smaller percentage of the incremental profits that can be obtained from such activity. The proposed maximum fee of 12.5% is small compared with the average of 34 to 54% of revenues that the typical broadcaster must now pay for programming.

We recognize that any fee schedule that is proposed at this time will, of necessity, be speculative; there has not been sufficient time to gain useful operating experience. However, once a fee schedule is adopted, the pressure to retain it as a maximum will be overwhelming. Cable will argue that it relied on the statutory fees in planning its expenditures and charges. Any fee schedule thus runs the risk of becoming a permanent feature of the compulsory licensing scheme.* It is important, therefore, that the fee schedule that is adopted be realistic and equitable at the outset.

While the proposed statute does provide for periodic review of the adequacy of the statutory fees, subject to Congressional approval, we do not believe that these procedures will work. There are conflicting interests in this area. The adjustment process will be long and complex. Approval by the Copyright Tribunal and Congress will inevitably require *de novo* review. The process to obtain change will be complex, uncertain and time-consuming. A realistic and equitable schedule should be in the statute from the beginning.

In short, we believe that the establishment of a realistic fee schedule will encourage cable to develop new programming and programming services and not rely exclusively on its right to appropriate programming from free television at nominal costs. In this manner, the public will receive meaningful alternatives and have the best that both cable and free television can offer.

We also have the following comments and suggestions concerning the proposed Section 111.

First, if higher fees are not enacted now, then certain kinds of programming should be exempt from compulsory licensing and subject to normal rules of copyright exclusivity. Sports events, particularly local sports events, are the best examples. If a cable system can obtain such programming from free television at nominal costs, derive substantial revenues from such appropriation, and use the revenues it then obtains to outbid free television for these and other attractions in the future, the entire public will eventually be denied free access to such attractions and some of the public, in homes unserved by cable, will be denied all access.

In any event, we support the exclusion from compulsory licensing for sports events that are blacked out in local areas.

We are not seeking legislation that immunizes us from competition with cable television. We are merely saying that the law should not favor either industry. The proposed statute would give cable a substantial advantage by permitting it to obtain programming for nominal charges at the same time that

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*It is most instructive that Section 801 of the proposed Statute empowers the Copy-
presupposes that the proposed rates are reasonable now. We do not believe they are.
right Tribunal to assure that the statutory rates "continue to be reasonable." This

free television must pay substantially more. Cable should not be the statutory beneficiary of such an advantage.

Second, in no event should Congress attempt to determine now what cable will pay in the future for additional distant signal importation beyond the present authorized limit. The fees for such additional importation should be left to the forces of the market and consumer interest and support. There is no way of knowing now whether the fees currently proposed for increased distant signal importation will be adequate, or, for that matter, excessive.

Third, since the compulsory licensing scheme is a broad exception to the rights that a copyright owner normally has, certain exclusivity rights should clearly be set forth in the copyright statute and not depend on any other agency, such as the FCC, for their continuation. The FCC has recently promulgated exclusivity rules (see FCC Rules, § 76.91 *et. seq.*). We are especially anxious that, as a minimum, the FCC rule that guarantees us "simultaneous" exclusivity for network offered programs, *i.e.*, a prohibition against importing a network program into a market at the same time it is offered by a network affiliate in that market, be incorporated in the copyright statute itself.

B. Section 114

Section 114 provides for a separate performance fee for the use of sound recordings as well as creating a separate copyright in such material. We understand that the main purposes of the Section are to give record companies greater protection against record piracy and to enable such companies and performers to make more money. As a major user of records, we oppose the imposition of additional charges for the right to play records on the air that will merely benefit manufacturers and performers, as opposed to the creators of copyrighted works. We believe that protection from record piracy can be achieved by creating a separate copyright in sound recordings without creating a separate performance right that will burden broadcasters. In short, we believe that Section 114 goes too far and is unnecessary.

In the past, record companies and performers have recognized that there was an advantage in having their records used by radio stations. Most records were supplied without charge. We see no reason why Congress should now create a new revenue base for manufacturers. Section 114 will force broadcasters to pay record companies for the "privilege" of increasing their record sales. That is not the purpose of the Constitutional guarantee of copyright protection.

Similarly, it strikes us as being unwise for Congress to involve itself in creating a new revenue base for performers, many of whom are already well-paid and successful. In all probability, lesser-known talent will not benefit that much. The compensation that performers receive should remain a function of private negotiation, not national legislative policy.

At present, we must pay performance rights societies (ASCAP and BMI) for the right to perform copyrighted musical works. If we also must pay record companies for the right to play records of the same copyrighted musical work, our fees may double. There will also be added administrative costs.

We thus oppose Section 114 as an unwise extension of what is validly needed "to promote the useful arts and sciences."

We appreciate the opportunity to present our views to this Subcommittee and stand ready to assist it in whatever way is useful.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
August 1, 1973.

Hon. JOHN MCCLELLAN,
New Senate Office Building,
Washington, D.C.

MY DEAR SENATOR MCCLELLAN: In the course of my testimony this morning concerning S 1361, I was asked on several occasions as to NCTA's attitude toward the so-called OTP Consensus Agreement. I indicated that NCTA is now and has always supported what we regard as the basic intent of the Agreement, namely that all parties work toward the early passage of copyright legislation. This, of course, we have done while others have sought to impede the legislative process on this subject. In any event, however, I did not choose to allude in my testimony to the extraordinary pressures which were placed upon NCTA and the cable industry by both the Office of Telecommunications Policy and by members of the administration to accept the terms of the Consensus Agreement. I feel it only fair to say that the cable industry was offered as an alternative only the indefinite extension of the FCC's "freeze" or the equally unattractive possibility of extensive and unproductive congressional hearings.

After reviewing my notes, I feel it imperative to offer the above comments at this time and ask that they be included in the record.

Very respectfully yours,

DAVID H. FOSTER.

SUPPLEMENTAL COMMENTS OF NATIONAL CABLE TELEVISION ASSOCIATION, INC.

During testimony on S. 1361 on August 1, 1973, several questions were asked of NCTA witnesses which required some research to answer. Chairman McClellan directed NCTA to submit the answers to the Subcommittee in written form. We have attempted to do so herein.

1. The effect of the graduated fee scheduled in Section III on the nation's three largest cable television systems (two in New York City and one in San Diego); and the effect of doubling that fee schedule

The three largest cable systems in the United States in terms of the number of subscribers served are Mission Cable TV, Inc., San Diego, California; TelePrompTer Manhattan CATV Corp., New York City; and Sterling Manhattan Cable TV, New York City. At the outset, it should be noted that of the three CATV systems only the San Diego system is reported to be at all profitable.

NCTA has obtained from these companies the total revenues from subscriber service fees for the most recent quarter in the 1973 calendar year for which data were available. NCTA calculated the copyright fee payments that would be required were the fee schedule in Section III in effect at the time, and made a further calculation to determine the effect on revenues of a doubling of the proposed fee schedule:

	TelePrompTer Manhattan	Mission Cable TV	Sterling Manhattan
Quarterly revenues	$911,909	$937,497	$1,040,000
Copyright fee payment under sec. 111 schedule	41,595	42,857	48,000
Effective rate (percent)	(4.56)	(4.57)	(4.62)
Copyright fee payment if sec. 111 schedule was doubeld	83,190	85,750	96,000
Effective rate (percent)	(9.12)	(9.15)	(9.23)

Assuming the quarterly revenues to be constant for the purpose of projecting a full year's payment of copyright fees—actually understating the true annual effect, inasmuch as subscriber revenues would increase each quarter from subscriber additions—the annual payments by the three systems, under the fee schedule in Section 111, would range from $166,380 to $192,000; under a doubling of the fee schedule, copyright payments would range from $332,760 to $384,000. Collectively these three systems would pay at least a half million dollars in copyright fees for the current calendar year under the schedule in Section 111, and more than a million dollars were the schedule doubled.

The imposition of high copyright fees on these cable systems and on those presently under construction or proposed to be built in the major markets will have an adverse impact on the earnings of those systems now or soon-to-be operational, and may well deter cable construction in undeveloped markets.

2. The effect of doubling the fee schedule in Section 111 on the rate of return on total capital of projected major market CATV systems

In his testimony of August 1, NCTA President David H. Foster cited a study by Dr. Bridger Mitchell on the impact of copyright fee proposals on major market CATV systems in which he found that the effect of the fee schedule in Section 111 would be to *reduce the rate of return on total capital* a full percentage point for profitable or near profitable systems. Responsive to the Subcommittee's desire that NCTA provide pertinent data on the effect of a doubling of the fee schedule in Section 111, Dr. Mitchell has calculated that, under a doubling of fee payments:

(A) *Large systems* on the edge of major markets which, without any copyright liability, will earn a 10–13% rate of return, would have that rate reduced to 7.5–11.0%—a reduction on total capital of two or more full percentage points.

As NCTA pointed out in its earlier testimony, even a *one point reduction in rate of return would be devastating* to the cable television industry's investment environment since a 10% return is considered the minimum acceptable.

(B) *Intermediate size systems* on the edge of major markets, which Dr. Mitchell found would be only marginally profitable without any copyright liability at all, *would thus be severely threatened* by a doubling of the proposed fee schedule.

(C) Of course, since *all systems* in the center major markets are not projected as being profitable at the present time, any copyright fee would make profitability so remote as to *preclude development*. Dr. Mitchell's figures follow:

	No fee	½ percent to 2½ percent	1 to 5 percent	2 to 10 percent
Large systems (25,000 subscribers) in edge markets:				
Rate of return (10% rate of return is necessary to attract capital)	9.7-13.4	9.2-12.8	8.6-12.2	7.5-11.0
Effective rate	0	2.0	3.9	7.8
Intermediate systems (10,000 subscribers) in edge markets:				
Rate of return (10% rate of return is necessary to attract capital)	5.5-8.1	5.2-7.7	4.8-7.3	4.1-6.5
Effective rate	0	1.2	2.4	4.8
Center market systems: Rate of return	0	0	0	0

Note: Any fees obviously add to projected losses.

3. The effect of doubling the fee schedule in Section 111 on the pre-tax income of the major cable television companies

As NCTA pointed out in the testimony of David H. Foster on August 1, the effect of copyright payments on the earnings of the major cable television companies is crucial to the major market development of cable television. An increase in the statutory fee schedule could halt CATV's development.

NCTA's written testimony showed the effect of copyright payments, under the present fee schedule in Section 111, on the pre-tax income of eight of the largest cable television companies in the nation. *Pre-tax* income of those companies would be *reduced* by copyright fee payments, under the present Section 111, from 7.5% to 32% with an average of *19%*.

If the fee schedule in Section 111 were doubled (to range from 2% to 10%), the pre-tax income of those companies would be *reduced* by copyright fee payments from 15% to 64% with an average of nearly *40%*. Assuming the corporate tax rate, income, after taxes, could be reduced as much as *80%*.

If the fee schedule were raised, a reduction of pre-tax income in this magnitude would threaten to completely shut off the already limited flow of investment funds to all but the very largest and financially strongest companies.

4. The amount of "copyright fees" paid by television stations for the broadcast use of copyrighted materials

Television stations include "copyright fees" paid to owners of syndicated programs in the total price when they buy the use of a product (a motion picture or a "package" of motion picture films, a single television program or a series of programs) under varying terms of usage. The total price may vary to reflect such matters as the number of times the product can be televised within certain periods of time, etc. Included in the purchase price, which is generally arrived at in bargaining between the station and the distributor (with the price varying by the size of the market, the bargaining ability of the station, the desire of the distributor's agent to make a quick sale, and any number of other reasons), are various costs associated with the distribution of the product and the profit to the program owner. The extent of the Profit depends a great deal upon the quality of the product (and its potential value in attracting audiences), and the ability of the distributor to extract high prices from the television stations.

NCTA's analysis shows that the owners of *syndicated* programs realized a gross income of $179.6 million in 1971 from sales to television stations (this is based on FCC figures). After subtracting the costs of distribution, advertising, talent, etc., approximately $50 million in profit remains. *This represents a profit margin to the copyright owner in excess of 25%.*

The concept of cable television liability (imposition of a "copyright fee" based on a percentage of gross revenues from basic subscriber service fees) is a new and distinct way for the copyright owner to obtain a *greater profit*, above that received from television stations for the broadcast use of his product (which, in most instances is readily available to cable subscribers who, even without a cable connection, could receive the program directly from a home antenna). Because cable television improves signal quality and audience range, advertisers are charged higher rates by the broadcaster and the broadcasters can share his added income with the copyright owner. However, cable television operators receive *no* compensation from the broadcaster for expanding his coverage.

5. Profitability of the three national television networks and television stations vs. cable television system revenues

In May of 1973, the FCC released data on the 1972 revenues and profits of the three national television networks and their 15 owned and operated stations.

The FCC data shows that profits before federal income tax were $213.4 million (an increase of 47.2 percent over 1971).

Similar data on all other television stations for the year 1972 is not currently available from the FCC. However, 1971 data released by the Commission in August 1972, showed profits before federal income tax of $244.3 million for 673 television stations.

Because there is not available a central authoritative source of information on the profitiability of cable television systems, no comparisons can be drawn between network/television station profits and CATV profits.

However, in 1972, the estimated *gross revenues* (from subscriber fees, installation fees and other income) of the approximately 2,900 cable systems then in operation, was $438,100,000.

Thus, the combined pre-tax *profits* of the three television networks and their 15 owned and operated television stations in 1972 ($213.4 million) and the 1971 pre-tax profits of 673 television stations ($244.3 million) exceeded the total 1972 *revenues* of the 2,900 CATV systems by nearly $20 million.

It is ironic that the television industry and the copyright owners, whose combined *profits* dwarf the entire *revenues* of the cable television industry and which already reflect financial benefit derived from CATV through expanded audience coverage, should seek to extract an even greater profit from this emerging industry in the form of unreasonable payments for copyright liability.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Washington, D.C., August 29, 1973.

Hon. JOHN L. MCCLELLAN,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR MCCLELLAN: Enclosed are schedules of CATV industry copyright payments under the fee schedule proposed in S. 1361, as compared to the effect of doubling that schedule. Enclosed also is an addendum of selected data on the profitability of television program syndicators, the three national television networks and television stations. Although this information is similar to that prevously submitted, we believe that it points up the serious economic impact of copyright payments in the cable television industry as compared to the tremendous economic strength and profitability of the television broadcasting industry. For this reason we believe and respectfully request that this information be inserted in the record of the hearings on S. 1361.

You will note that the data in the addendum were based primarily on 1971 statistics published by the Federal Communications Commission. Since the preparation of the addendum, the FCC has published comparable figures for 1972, which show that total television broadcasting revenues were 3.18 billion dollars with pre-tax profits of 552 million dollars. These profits represented an increase of 42% over 1971 and were cited by the broadcasting industry as a return to "more normal levels." Put in the simplest terms, these *profits* exceeded the total cable industry's *revenues* for 1972 by more than 110 million dollars. Needless to say, the broadcasting industry has never offered to reimburse the cable industry for that portion of its profits derived from the additional audiences made possible by CATV.

With kindest personal regards, I am
Very truly yours,

DAVID H. FOSTER.

Enclosure.

COMPARISON OF CATV INDUSTRY—COPYRIGHT ROYALTY PAYMENTS

A.—By the industry, based on 1972 data.

System size category	Annual gross revenue	S. 1361 royalty rate (percent)	Number of systems in category	Average gross revenue	Average royalty fee	Total royalty fees
51 to 2,600	$114,653,510	1	1,962	$58,437	$584	$1,146,535
2,601 to 5,300	80,295,862	2	359	223,665	2,873	1,031,407
5,301 to 8,000	53,905,199	3	137	393,468	7,004	959,548
8,001 to 10,000	35,323,427	4	63	560,689	12,828	808,164
Over 10,000	106,437,912	5	97	1,097,298	38,865	3,769,905
Total						7,715,559
20 percent to 10 percent scale total						15,431,118

B.—By selected system size category.

System size	Annual gross revenue	S. 1361 royalty fees	2 percent to 10 percent scale royalty fees
5,000	$312,000	$4,640	$9,280
10,000	624,000	15,360	30,720
15,000	936,000	30,800	61,600
20,000	1,248,000	46,400	92,800
25,000	1,560,000	62,000	124,000

C.—Synopsis of effect on CATV systems' net income.

	By month		By year	
Per subscriber: Revenue	$5.20			$62.40
Deduct:				
Operating overhead		$2.60	$31.20	
FCC fee		.03	.30	
Franchise fee		.16	1.87	
Interest		.75	9.00	
Federal, State, city, county tax	4.84	1.30	15.60	57.97
Subtotal	.36			4.43
S. 1361 royalty fees at 2 percent	.10			1.25
Net income	.26			3.18

D.—Royalty fees cannot be passed on to CATV subscribers because regulators have denied rate increases and subscribers will not pay additional amounts. Therefore, a high copyright fee schedule will yield no more revenues to copyright owners than a low fee schedule.

ADDENDUM

A.—CATV increases coverage area of TV stations and improves picture quality, but the CATV operator does not alter programs or commercials and gets no revenue from advertising on the TV signal. His sole revenue is from subscribers monthly fee (average $5.20 per month).

1. Copyright owners of syndicated TV programs had 1971 sales of	$179,600,000.00
Made profits of about	$53,900,000.00
Profit rate of (percent)	30
2. 3 TV networks had 1971 revenues of	$1,378,900,000.00
Made before tax profits of	$144,900,000.00
Profit rate of about (percent)	10½
3. TV stations had 1971 revenues of	$1,371,400,000.00
Made before tax profits of	$244,300,000.00
Profit rate of about (percent)	18

B.—TV stations charge advertisers based on TV coverage. The rate cards of 3 New York City newtork stations are—

Station	Hour	30 min	15 min	5 min	30 s	20 s	10 s
WABC	$11,500	$9,500	$4,500	$3,000	$5,800	$4,600	$2,600
WCBS	10,000	8,000	4,000	3,500	6,000	4,000	3,000
WNBC	10,700	8,500			6,000	5,000	2,800

C.—Copyright owner and television profits are larger than CATV gross revenue.

Note: Data in the addendum were obtained from the following sources: Item A-1, sales from syndicated programs, from "TV Broadcast Financial Data—1971," published by the Federal Communications Commission; data on the profitability of program syndication were obtained from surveys of several knowledgeable industry sources; Items A-2 and A-3 were developed from "TV Broadcast Financial Data—1971"; Item B data were obtained from the 1972-1973 edition of Television Factbook.

NATIONAL EDUCATION ASSOCIATION,
Washington, D.C., August 9, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: During the testimony of the Ad Hoc Committee on Copyright Law Revision at the copyright hearings on July 31, you made the following statement: "I think it is valid and important to ascertain what the impact of this educational exemption for educational purposes is" [the limited educational exemption which the Ad Hoc Committee is proposing]. And you added a question, "What impact, if any, will this have on the ability of present sources to continue to make such materials available? If it is serious, it ought to be weighed; if it is trivial, it ought to be ignored."

In response to your question, you will recall that I read the opening paragraph of a news release issued by the Educational Media Producers Council on May 16, 1973, entitled "DEMAND FOR EDUCATIONAL AUDIO-VISUAL MATERIALS RISES 10.8% in 1973."

In order that the members of your Subcommittee might have access to the entire news release, I am attaching a copy hereto and respectfully request that you give permission to add it to the record of the hearings.

I believe this news release shows clearly the fact that the educational media producers are not suffering because of uses of their materials by the educational community. I think it important to stress here that the Ad Hoc Committee is *not* urging Congress to give teachers, librarians, educational broadcasters, etc., a broad exemption which far exceeds statutory "fair use." We are simply asking that Congress make legal the limited reproduction practices which teachers are now undertaking as part of their day-to-day teaching responsibilities. These practices have been delineated in our testimony. We are not asking for more privileges for copying but rather for protection for the rights we now exercise in fact. As you know from our testimony, we seek a limited educational exemption, or, in lieu of this, a broadly interpreted "fair use" clause with outright rejection of the Williams & Wilkins decision and with authorization for limited, multiple copying of short, whole works such as poems, articles, stories, and essays for classroom purposes and with "fair use" extended to include instructional technology as well as print materials. Publishers will fare no worse than they now fare under the existing law. As you will see from the attached news release, publishers are faring pretty well, and we would say the source of materials is by no means drying up.

Again, we should point out that we give visibility to the authors' works and, as a result, create markets for them. One could even make the point that publishers and authors should pay teachers for promoting their works in the classroom!

Thank you for the opportunity to testify before you and the members of your Subcommittee.

Sincerely yours,

HAROLD E. WIGREN,
Chairman, Ad Hoc Committee (of Educational Organizations and Institutions) on Copyright Law Revision.

Attachment.

EDUCATIONAL MEDIA PRODUCERS COUNCIL,
Fairfax, Va., May 16, 1973.

DEMAND FOR EDUCATIONAL AUDIO-VISUAL MATERIALS RISES 10.8% IN 1973

Fairfax, Va.—Greater use of audio-visual materials continued to characterize the classroom in 1972 according to a report to be released May 31 by the Educational Media Producers Council. The *EMPC Annual Survey and Analysis of Educational Media Producers' Sales* shows total sales of non-textbook instructional materials rose to $214.7 in 1972, an increase of 10.8% over 1971.

The survey, conducted by an independent market research firm under the auspices of the Educational Media Producers Council, presents a comprehensive picture of total industry software volume and a wide range of statistical data and analysis of the education market. It includes information gathered from more than 217 audio-visual producers. Represented in the survey are small filmstrip houses as well as the largest educational publishers, stated EMPC Executive Director Daphne Philos.

The report shows building level materials sales—traditionally, those materials whose unit cost is modest enough to permit acquisition by, and storage within, individual school buildings—continued to widen their lead over the higher-priced 16mm films, commanding an impressive 74.8% share of the total educational media market. Building level materials sales increased 13.7%, while 16mm film sales rose a modest 3.3% in 1972. 16mm films continued to lead all audio-visual materials in dollar expenditures, however, with total sales of $54 million.

Sound filmstrips led all building level materials in volume increase, rising $6.2 million, but multi-media kits experienced the greatest *rate* of growth, spurting 23.1% to $27.2 million. Pre-recorded tapes were up 21.5% and 88mm silent film loops increased 17.3%.

The impact of the audio cassette on educational media development and sales continues to be dramatic. Whereas in 1969 cassette volume was considered too insignificant to warrant a separate category in the *EMPC Annual Survey and Analysis*, cassettes accounted for 86.1% of all pre-recorded tape sales last year. In a parallel—though less pronounced—development, the cassette version of the sound filmstrip continued to gain ground on the record version, accounting for 41.9% of total sound filmstrip sales in 1972, up from 33⅓% the preceding year.

Since 1966, the first year the Educational Media Producers Council conducted its industry wide survey, audio-visual materials sales to education have increased 81.9%, making strong inroads into the traditionally textbook-oriented education market. Sales of the textbook—which remains the dominant instructional medium—have increased by 22.7% during the same period.

Copies of the 20-page *EMPC Annual Survey and Analysis* are available for $37.50 from Educational Media Producers Council, 3150 Spring Street, Fairfax, Virginia 22030.

THE NEW ENGLAND JOURNAL OF MEDICINE,
Boston, Mass., August 6, 1973.

MR. STEPHEN G. HAASER,
Senate Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, Dirksen Building, Washington, D.C.

DEAR MR. HAASER: I am Dr. Franz J. Ingelfinger, Editor, New England Journal of Medicine, 10 Shattuck Street, Boston, Massachusetts 02115. In the past I have been Chairman of the Editorial Board of the publication *Gastroenterology*, a two-term member of the Editorial Board of the *Journal of Clinical Investigation*, and for 14 years an editor of the *Year Book of Medicine*. I was for 14 years a member of various advisory boards to the NIH. I have also been a National Consultant to the Air Force, and a Consultant to the Veterans Administration and the Army. I currently serve as a Consultant to the FDA and the National Library of Medicine.

I appreciate this opportunity to present my views of the copyright bill, S. 1361, and request that this statement be made part of the official record.

Of the many criticisms made of the American health care system, one of the most serious and also one of the most accurate is its lack of efficient and appropriate communication at all levels. The practicing doctor is overwhelmed with "facts," but their mass is disorganized and unselective; thus the practicing physician is not effectively exposed to the best information available at academic centers. The trainee in medicine—the student and the house officer—is similarly discouraged by the abundance of information that is available somewhere, but which he cannot obtain because it is widely scattered and often inaccessible. Even research scientists face similar difficulties.

This otherwise dismal communication picture is alleviated in part by a number of indexing, abstracting, and duplicating services, and outstanding among these are the services of the National Library of Medicine which make it possible for physicians, scientists and students to discover titles and information pertinent to their needs. But the title, or even an abstract, is not enough; the entire article must be made available to the doctor if he is to use the new medicine correctly, or to the student if he is to understand a new process adequately. He needs a copy of the original publication.

The distribution of copies of original articles by the National Library of Medicine and by other medical libraries is thus a communiction system that must be sustained and nurtured rather than impeded. To place further financial constraints on the ready distribution of copies of medical articles is to interfere, ultimately, with the quality of medical practice in this country. Thus I should like to oppose in the strongest terms the provisions of section 108, (d), (1) in S. 1361. The difficulties that this portion of the bill would impose might convert many a potential user to a nonuser, and many a medical library from a unit that now survives to one that would fail because of increased financial burdens. I cannot believe that such consequences reflect the desires of the medical profession, of Congress, or of the American people. These desires, moreover, should take precedence over the needs of commercial endeavors that wish to protect their investment by more stringent copyright laws.

It is my understanding that the American Library Assoication has submitted to you a substitute for section 108, a section that would entitle a library or archives to supply, "without further investigation," "a copy of no more than one article or other contribution to a copyrighted collection or periodical issue." This wording would eliminate the serious problems that I anticipate if the present version of the section is allowed to stand.

May I also have the privilege of submitting to the Committee copies of an editorial I have previously written on the same subject, an editorial that was published in the New England Journal of Medicine, volume 287, page 357, in the issue of August 17, 1972.

Once again, may I thank you for the privilege of being permitted to submit my views on this important matter.

Sincerely yours,

FRANZ J. INGELFINGER, M.D.

Enclosures.

CRUCIAL LIBRARY SERVICES DEPEND ON PHOTOCOPYING

The welter of complaints about the mass, slowness and unmanageability of medical communication obscures its numerous assets. One of these is photocopying, the process that makes it possible for you and me to obtain a copy of any article in a medical library's holdings. Moreover, by a remarkable hierarchial system spreading outward from the National Library of Medicine (NLM) to its 11 regional affiliates, and thence to community hospitals, a photocopy of practically any article ever recorded in the medical literature is available for our use. In 1971 the NLM and its regional branches sent out nearly half a million photocopied items of this type.[1] An approximately equal number of photocopies of medical material was probably made and given to consumers of medical literature by libraries operating independently of the NLM network. The making and distribution of such photocopies, moreover, were often supported by the federal government or by local funding mechanisms; in some instances the customer had to pay a nominal fee. Thus, photocopying is at the heart of a remarkably effective, economically reasonable, and extensively used method of spreading the medical news. If it exists in print, the description of an elaborate extraction procedure is available to any laboratory worker, and the authoritative evaluation of a new diagnostic approach can lie on any practitioner's desk.

No one, surely, would wish to interfere with this system of making the entire library resources of the United States available to the totality of potential patrons, particularly in view of the numerous complaints that the science and practice of medicine suffer for lack of interconnecting spans. Unfortunately, some do wish to interfere. Beginning in January, 1973, articles appearing in (or that have appeared in) the 38 scientific journals published by Williams and Wilkins will not be so readily available for photocopying. On the basis of a report made by a commissioner of the United States Court of Claims, Williams and Wilkins will impose a charge of 5 cents a page on all multiple copies of a single article, and on all copies (even single ones) made for inter-library dissemination. (If this charge were to be applied to all publications, a yearly fee of about half a million dollars would be collected from NLM.) Libraries will be licensed to make single copies of articles from Williams and Wilkins publications to fulfill requests from individual patrons, but the tribute exacted from libraries for this license is an increase in the library's subscription prices for Williams and Wilkins journals amounting to an average of $3.65 per volume.

Photocopying may impose an economic squeeze on small-circulation journals, but efforts to protect the welfare of such journals should not be permitted to jeopardize what is one of the redeeming features of our struggling system of medical communication. Educational and scientific groups representing many facets of American medicine have deplored the action taken by Williams and Wilkins. JAMA published a fine editorial pointing at the impediments to communication and the cost escalation that may ensue.[2] The New England Journal of Medicine joins in this protest against a move that threatens a communication mechanism evolving in response to today's and tomorrow's needs. The *Journal* reaffirms its policy with respect to photocopying: libraries and other nonprofit institutions may photocopy *Journal* articles at will.

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[1] Cummings MM, Corning, ME: The Medical Library Assistance Act: an analysis of the NLM extramural programs, 1965–1970. Bull Med Libr Assoc 59:375–391, 1971.

F. J. INGELFINGER, M.D.

THE NEW REPUBLIC,
August 10, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR: While the New Republic did not appear before your committee to consider the effects of photocopy, we would like to take this opportunity to endorse the testimony of the American Business Press, the American Chemical Society, and the American Association of University Press.

Without copyright protection, magazines like The New Republic could perish very easily. We understand libraries desire the unrestricted right to photocopy one copy at a time. Each time this happens, our limited market is further restricted.

We are perfectly willing to give reasonable consent, but it is the sanctity of the copyright that has made possible the free flow of information in the U.S.

We are therefore hopeful that Sec. 108 will be limited to archival reproduction and the Library amendment will be defeated.

Sincerely yours,

ROBERT J. MYERS, *Chairman.*

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., July 31, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Judiciary Committee, U.S. Senate.

DEAR MR. CHAIRMAN: Because of heavy congressional activities, it is not possible for me to address your committee, but I would be pleased if you could place the enclosed material in the committee record.

As you can see from the text, this matter is of great concern to me because of its effect on a great many individuals in my congressional district.

Sincerely,

THOMAS M. REES,
Member of Congress.

Enclosure.

Mr. Chairman: My name is Thomas M. Rees. I'm a member of Congress from the 26th District of California. My district encompasses Hollywood, Beverly Hills, and much of the San Fernando Valley. Many of my constituents are employed in the film industry and are deeply concerned about Section 111 of S. 1361, the copyright fee schedule. It's our feeling that the schedule is inadequate and inflexible. We hope that the subcommittee will re-draft the section to encompass the 1971 consensus agreement.

The Consensus Agreement to which I am referring was formulated in November of 1971 and at that time received broad support throughout the industry. To refresh the committee's memory, the Committee of Copyright Owners, the National Association of Broadcasters, and the National Cable Television Association, representing copyright holders, broadcasters, and cable system operators respectively, came up with an agreement, on the heels of intensive discussions, at the behest of the FCC and the OTP and with the sanction of this committee and its chairman.

Regrettably, one of the major objectives of these meetings, the formulation of a realistic fee schedule, was not achieved due to the complicated nature of the problem. The agreement acknowledges this difficulty and contains a provision calling for compulsory arbitration in the event rates cannot be agreed upon. I would like to stress that the copyright holders place a great deal of emphasis upon compulsory arbitration as the only fair and equitable method of assuring rates acceptable to all of those involved.

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[2] Editorial, Photocopying and communication in the health sciences. JAMA 220:1357–1358, 1972.

Further, it should be pointed out that the copyright holders represent the creative elements responsible for producing works of artistic nature and of entertainment value which contribute significantly to cable television programming. The copyright holders are indeed the major program suppliers to this rapidly-expanding medium.

In closing, Mr. Chairman, I would like to say that as a representative from California, I am deeply concerned with the future of cable television as a source of employment for a presently troubled industry, and as a source of creativity for the entire Nation.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., August 3, 1973.

Hon. JOHN MCCLELLAN;
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Senate Judiciary Committee.

DEAR MR. CHAIRMAN: I am concerned about the possibly adverse effects of section 111 of Senate bill 1361 currently under your committee's review, which sets forth a cable television copyright fee schedule.

It is my understanding that in November, 1971 representatives of copyright holders, broadcasters and cable system operators reached a compromise agreement concerning signal carriage and copyright issues. This agreement was endorsed by the Federal Communications Commission and the Office of Telecommunications Policy. On the fee schedule, the parties agreed to settle their differences by compulsory arbitration in the absence of a mutually acceptable rate schedule.

As you know, both sides have failed to resolve this issue, and have presented conflicting economic studies to document their claims. I believe it would be hazardous for Congress to intervene in this matter at this time and impose an initial fee schedule which may be economically advantageous to only one side. Since the 1971 agreement already provides for legally binding arbitration to settle this dispute, I recommend that this approach be adopted in determining fair and reasonable copyright fees.

Sincerely yours,

EDWARD R. ROYBAL.
Member of Congress.

STATE LIBRARY OF PENNSYLVANIA
Harrisburg, Pa., August 19, 1973.

Hon. HUGH SCOTT,
U.S. Senate,
Senate Office Building,
Washington, D.C.

DEAR SENATOR SCOTT: I am informed that the Senate Sub Committee on Patents, Trademarks and Copyrights conducted hearings on Senate Bill No. 1361 on July 31, and that the hearing record will be closed on August 10.

I respectfully request that the attached statement be made a part of the hearing record, since the subject matter is of grave importance to Pennsylvania libraries, archives and the State Library.

Thanks very much for your often demonstrated interest and support for the programs and resources of American Libraries.

Sincerely,

ERNEST E. DOERSCHUK, Jr.,
State Librarian.

COMMENTS ON SENATE BILL 1361

Libraries of all types in Pennsylvania are meeting individual user needs by vigorous exchange of materials and by providing single-copy extracts of articles and other printed materials needed by researchers and students. Libraries have relied on the "fair use" concept to protect them against charges of copyright infringement.

While Senate Bill No. 1361 incorporates the "fair use" principle in Section 107 of the Bill, it does not specifically offer the library or archive immunity from prosecution for copyright infringement if it makes even one copy of copyrighted material in response to a request from another library or from an individual.

So that libraries may serve the needs of users to the fullest extent and with a minimum of delay, I urge:

(1) that a library or archive be specifically entitled to make no more than one copy of an article or portion of printed copyrighted material, or of a phonorecord, to assist in teaching, research, or in filling an interlibrary loan request from another library or archive;

(2) that a library or archive be entitled to make a copy of an entire copyrighted work if the library or archive has ascertained that the work can not be readily obtained from trade sources; and

(3) that a library or archive providing a copy of copyrighted material shall attach to the copy a warning that the material copied appears to be copyrighted.

I believe that the above provisions can be incorporated in an amendment to Senate Bill No. 1361 as Section 108(d) as recommended by the American Library Association, and I respectfully urge such amendment as a measure necessary to facilitate research and exchange of materials among libraries.

ERNEST E. DOERSCHUK, Jr.,
State Librarian of Pennsylvania.

CITY OF PHILADELPHIA,
FREE LIBRARY OF PHILADELPHIA,
Philadelphia, Pa., August 7, 1973.

Senator HUGH SCOTT,
Senator from Pennsylvania,
Russell Senate Office Building,
Washington, D.C.

DEAR HUGH: I am writing to you on behalf of the Board of Trustees and staff of the Free Library of Philadelphia concerning the current hearings of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary.

Mr. Edmon Low testified before the Subcommittee on behalf of the American Library Association asking that the amendment to the copyright revision bill, S. 1361, include a definite statement that making a single copy to aid in teaching and research, and particularly in interlibrary loan, is permissible and not subject to possible suit for this activity in behalf of the public good. We wholeheartedly endorse this position and ask your support of this recommended revision. Without such a provision librarians in Pennsylvania and throughout the nation would be seriously restricted in their ability to offer quality reference service and in the general performance of their duty to patrons.

We would be appreciative if you would include this letter as a part of the committee's hearing record.

Sincerely yours,

WILLIAM W. BODINE, Jr.,
First Vice President, Board of Trustees.

SPANISH INTERNATIONAL NETWORK,
New York City, September 14, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: On July 31 and August 1 of this year, the Senate Subcommittee on Patents, Trademarks and Copyrights held hearings on various aspects of S. 1361, a bill providing for the general revision of the Copyright Law (Title 17, United States Code). At the conclusion of those hearings you extended an invitation to other interested parties to submit written comments on the proposed legislation. Spanish International Network and Spanish International Communications Corporation, a company operating Spanish-language television broadcasting stations in several major U.S. communities, therefore takes this opportunity to present a statement of its position on an aspect of the proposed bill which is of great concern to Spanish International—the matter of copyright liability for secondary transmissions by cable television systems.

Our position in this regard is set forth in the attached Statement of Spanish International Communications Corporation, which we respectfully request be made a part of the record of the Hearings held earlier this summer. If desired by the Chariman, we would be pleased to testify before the Committee on this matter.

Respectfully,

REYNOLD V. ANSELMO,
President.

STATEMENT OF SPANISH INTERNATIONAL COMMUNICATIONS CORPORATION

I. INTRODUCTION

Spanish International Communications Corporation is the Federal Communications Commission licensee of television broadcast stations KMEX–TV, Channel 34, Los Angeles, California, KFTV, Channel 21, Hanford, California, KWEX–TV, Channel 41, San Antonio, Texas, WLTV, Channel 23, Miami, Florida, and WXTV, Channel 41, Paterson, New Jersey. All of the Spanish International stations broadcast almost exclusively in the Spanish-language, serving some six to eight million Spanish-Americans (including Mexican-Americans, Puerto-Rican nationals and Cuban-Americans, among others) with quality news, public affairs and entertainment programming.

The continuation of such quality programming on our stations is now seriously theratened by recently adopted provisions of the Federal Communications Commission relative to secondary transmissions by cable television systems in the United States. It is this situation which prompts our submission which, as noted briefly above, deals principally with those provisions of the proposed legislation (S. 1361) which concern the copyright liability of cable television systems. A brief background discussion will serve to put our particular problem in proper perspective.

By letter to Congress dated August 5, 1971, the Federal Communications Commission set forth proposals for the future regulation of cable television systems. One such proposal was to permit the unrestricted importation, by U.S. cable operators, of foreign language television signals (in our particular case, television signals from Mexico). At the same time the Commission proposed to limit the cable carriage of distant English-language signals to what was termed "adequate television service" (see section 111(c)(3) of S. 13661). No such limitations were placed upon the cable carriage of foreign-language broadcast signals.

In a letter dated September 22, 1971, Spanish International requested the Commission to reconsider that part of its August 5 Letter of Intent which sought to permit the wholesale importation of Mexican broadcast signals. The letter took issue with the wisdom of such a policy and demonstrated that unrestricted importation of Mexican signals could well destroy Spanish-language broadcasting in the United States—a result, we urged, which could not possibly serve the public interest in an effective and viable *local* television service for the Spanish American population.

In our letter of September 22, 1971, we explained how this could occur. For example, we pointed out that Spanish International relies to a very large extent on programming which is carried by many, if not all, of the Mexican border stations, and that many of the best programs carried on the Mexican network, and distributed to border affiliates, are not made available to Spanish International until as much as a year or more from the date of first transmission in Mexico. In addition, we noted that while Spanish International is required to pay substantial duties, freight and taping charges to import quality Spanish-language programming, Mexican stations, and U.S. cable television systems importing their signals, are in a position to avoid these expenses. We concluded that all of these considerations added to a significant competitive disadvantage for U.S. Spanish-language broadcasters—who were now being asked to compete against Mexican as well as other U.S. stations, for an audience, which has been recognized by the Commission to be "limited in number".

Although it then appeared that the Commission's proposed cable regulations would tend to restrict importation of Mexican Spanish-language signals into markets where there is a local Spanish-language station, by counting such imported signals against the cable system's "quota", the current rules do not appear to have been interpreted by the Commission to give domestic stations such protection. In addition, in those markets with no local Spanish-language station, distant U.S. Spanish-language stations can be "overlooked" by cable systems in favor of Mexican stations—no such "leap-frogging" policy is now permitted for English-language stations. As noted earlier, this cannot serve the public interest in an effective and viable *local* television service for the Spanish-American population in this country.

We thus concluded that while importation of foreign signals may, in some few instances, be appropriate, it should not be allowed where the viability of U.S. Spanish-language television is jeopardized, or where U.S. stations offering similar program fare—e.g. foreign language—are available off-the-air or via microwave. And, we urged the Commission to adopt such a prohibition. In essence, we asked that where cable systems have the choice of carrying U.S. or Mexican foreign language stations, they be prohibited from importing Mexican stations.

Illustrating our point: many cable systems in Southern California receive both Mexican and Los Angeles signals off-the-air—including, for example, Spanish International's KMEX-TV—yet, many carry the Mexican station to the exclusion of KMEX-TV. There are also numerous cable systems in the four-state southwestern border area carrying Mexican stations via microwave where U.S. Spanish-language signals are also available. In each of these cases, however, the cable system is *not* carrying the U.S. Spanish-language station even though English language signals from the same market (Los Angeles, for example) are being carried on the cable system. This situation has proliferated under the Commission's cable rules.

Although recognizing that "foreign language stations fulfill an important need for what generally is an audience limited in number," the Commission, nevertheless, ignored the merits of Spanish International's arguments. In a footnote to its Cable Report the Commission stated:

> "[50] Following our August letter to Congress, the licensees or permittees of Spanish-language stations in Los Angeles and Hanford, California, San Antonio, Texas and Miami, Florida, wrote to the Commission requesting that importation from Mexico of Spanish language stations not be allowed where U.S. Spanish language programming is available either off the air or potentially available via microwave. *We recognize the arguments in favor of supporting domestic stations.* However, above all, we are attempting to encourage carriage of foreign language stations. Therefore, absent the unusual situation, we do not think any additional burden should be imposed on the cable systems involved." (36 F.C.C.2d 143 at 180; emphasis supplied)

At that time we found it difficult to understand, if the Commission indeed does "recognize the arguments in favor of supporting domestic stations", how it could ignore these arguments solely because an "additional burden" of unspecified magnitude would be imposed on cable television systems. We still find the Commission's determinations to be somewhat perplexing and irrational.

On March 13, 1972, Spanish International filed a Petition for Reconsideration of the Commission's Decision, noting its earlier arguments in this matter—principally, that a significant burden is being imposed upon domestic UHF Spanish language stations as a result of the Commission's Mexican importation policy, and that this policy fosters a grossly unfair competitive situation—and, in addition, pointing out that other domestic [i.e., U.S.] Spanish language businesses would be similarly "burdened" by the Commission's importation policy. In response the Commission stated, referring to our Request for Reconsideration:

"As we noted in the Cable Television Report and Order at footnote 50, petitioner requested following the issuance of our letter of intent, that importation from Mexico of Spanish-language stations not be allowed where U.S. Spanish-language programing is available either off the air or potentially available via microwave. The petition for reconsideration restates that request. But we considered the request in finalizing the rules and see no reason to alter our view. We are attempting to encourage the carriage of foreign language programing. *Where there is a local Spanish-language station, it will of course get carriage priority.* But outside its own market, where there is no "right" of carriage and no special need for protection against other stations programed in the same language, it is in the public interest to make foreign language programing available without impediment. In unusual situations where a domestic Spanish-language station makes a compelling demonstration for relief with respect to a particular application, we can afford such relief under § 76.7. This should serve to maintain the vitality of local foreign language services without general restrictions on the right of cable systems to distribute the programing of foreign stations." (emphasis supplied; *Reconsideration of Cable Television Report and Order*, paragraph 23; 36 F.C.C. 2d 326.)

The Commission, however, was far from being in complete accord on the matter of its Mexican importation policies. We would note particularly the dissent of Commissioner Robert E. Lee:

"The majority treats the U.S. foreign language stations most shabbily. These are struggling UHF stations, some losing money, some barely making it. The majority lets CATVs import Mexican foreign language stations into the U.S. without restriction—even though the Mexican fare is the same as appears on the U.S. stations, only a year more recent. *The majority says that the local UHF foreign language can object. Why should the burden be on the UHF to undertake relatively expensive proceedings?* And what about the community where there will now never be a local foreign language station because a CATV imports Mexican stations?

"Further, these U.S. stations get no anti-leapfrogging benefits. A CATV can be located 100 miles away from the U.S. foreign language station and yet can go 600 miles to Mexico if it wants to do so. How does the majority square this with its desire to help UHF, with its insistence that an ordinary UHF independent could not be bypassed if located within 200 miles (in the case of the third independent)?" (Emphasis supplied.)

Commissioner Reid expressed similar concerns:

"Another problem which was brought to the attention of the Commission by Petitions for Reconsideration was the problem of importing a foreign station for foreign language programs under the provisions of Section 76.58(4)(b); 76.59(2)(d); 76.61(2)(e). . . .

". . . *I believe we should have permitted cable systems to carry only those foreign stations whose signals were available off the air, and prohibit the importation of such signals by microwave*, from a foreign station. This is especially true when non-English broadcast stations are readily available to the cable system . . . especially so when they are Domestic Stations and it seems reasonable to me to protect them.

". . . We attempt to answer this problem by saying that—'In unusual situations where a domestic Spanish-language station makes a compelling demonstration for relief with respect to a particular application we can afford such relief under Section 76.7.'

"*While I recognize that they probably will file for special relief, and I would hope we would welcome it and grant favorable relief. I firmly believe that a general policy would have been more beneficial.*" (emphasis supplied; Concurring Statement of Commissioner Charlotte T. Reid, page 4).

Since the Commission's new cable rules became effective about a dozen additional cable system operators have proposed to import Mexican signals into some 25 different U.S. communities—some of which already have a local Spanish language station.

In these latter situations especially, a particularly onerous burden upon our stations is fostered by the Commission's cable rules. For example, Spanish International's KMEX-TV (Los Angeles) obtains significant quantities of its Spanish language programming from Spanish International Network Sales, which is the United States representative of V. T. Latin Programs, Mexico, whose associated company also supplies programming to XEWT-TV, Tijuana. Thus, both stations receive major amounts of programming from the same source and thus carry essentially similar program schedules. For example, XEWT-TV and KMEX-TV are both carrying the following Spanish-language programs during their current broadcast week:

	KMEX TV	XEWT-TV
Loco Valdez Show (30 min.)	Saturday, 7:30 p.m.	Monday, 7 p.m.
Variedades Vergel (30 min.) (Acompaname)	Thursday 10:30 p.m.	Monday 10:30 p.m.
La Criada Bien Criada (30 min.)	Monday, 9 p.m.	Thursday, 8:30 p.m.
Chespirito (1 hr.)	Friday, 8 p.m.	Saturday, 4:30 p.m.
El Comanche (1 hr.)	Monday, 8 p.m.	Ssturday, 3 p.m.
Box De Mexico (1½ hr.)	Saturday, 10 p.m.	Saturday (1 hr.), 10 p.m.
Football (2 hr.)	Saturday, 2 p.m.	Sunday (1 hr.), 4 p.m.
Noches Tapatias (30 min.)	Tuesday, 9 p.m.	Sunday, 9:30 p.m.
Muneca (1 hr.)	Monday-Friday, 7 p.m.	Monday-Friday, 11 p.m.

Thus, over 11 hours of KMEX-TV's weekly prime-time programming—which is obviously crucial to its continuing viability—would be duplicated by the signal of XEWT-TV. Several cable television operators in the Los Angeles area are now proposing to "import" the signal of XEWT-TV on their cable systems. In such circumstances KMEX-TV faces the possible loss of some 40% of its prime-time audience.

While in a normal situation involving English-language broadcast signals, pervasive duplication in programming of this magnitude would entitle the local television station to substantial program exclusivity protection (as provided by the Commission's cable television rules; see sections 76.151 *et seq.*), the applicability of the Commission's program exclusivity rules to Spanish language signals is unclear at best, and has never been determined by either the Commission or its staff. In this connection, many questions still remain unanswered. For example, are Mexican copyright holders subject to the notification requirements of section 76.155? Indeed, are the "copyright holders" referred to in sections 76.153 and 76.155 intended to include foreign nationals? If so, are Mexican copyright owners who desire to retain exclusivity privileges required to notify cable systems in the United States of programs broadcast in Mexico which are later to be licensed to U.S. television stations? What if the foreign copyright owner does not know when, or even if, such programming will be licensed to U.S. television stations or carried by U.S. cable systems? The Commission obviously has not faced these matters—yet the protection afforded to copyright owners under this scheme (even assuming such protection would be adequate for domestic Spanish-language stations given the significant competitive disadvantage faced by them) was intended to offset the possible inequities in the cable carriage rules. Thus, their resolution is paramount to a meaningful national copyright policy.

II. PRESENT COPYRIGHT LIABILITY OF CABLE TELEVISION SYSTEMS WHICH IMPORT MEXICAN BROADCAST SIGNALS AND THE PROPOSED S. 1361

Although there is no "international copyright" as such, protection against unauthorized use in a particular country of a copyrighted work of a foreign national is usually provided through an international agreement among nations. Both Mexico and the United States are signatories to several international and bilateral agreements which provide essential international protection to copyright owners of the respective countries; most notably, the Universal Copyright Convention and the Buenos Aires Convention of 1910, among others. As a general rule these treaties require a participating country—in our case, the United States—to give the same protection to foreign works—i.e., those broadcast programs produced by Mexican nationals—as it gives to works produced domestically, i.e., in the United States (see Article II, Universal Copyright Convention of 1952, and proposed section 104(b)(1) and (2) of S. 1361).

Thus, as a general rule, Mexican copyright owners of broadcast program fare carried by U.S. cable television systems are entitled to the same copyright protection as American copyright owners whose programs are also carried by those cable systems. Under the doctrine laid down by the United States Supreme Court in *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968), cable television systems were, in the limited circumstances then before the Court, held not to "perform" the copyrighted material within the meaning of the Copyright Act of 1909 (17 U.S.C. § 1), and thus, in effect, escaped copyright liability for the cablecast of copyrighted works which were part of the broadcast signal carried. Under Fortnightly, therefore, U.S. copyright owners were entitled to no protection from cable carriage of their works. In this way, Mexican copyright owners were entitled to no greater protection—and received none.

Subsequently, however, in *Columbia Broadcasting System, Inc. v. Teleprompter Corporation*, 476 F. 2d 338 (1973), the Court of Appeals for the Second Circuit distinguished the holding in Fortnightly as to the cable carriage of distant—i.e., non-local—signals, holding that when a cable television system distributed signals that were beyond the range of local television receiving antennas, the cable system was then functionally equivalent to broadcasting and would, in such cases, be deemed to "perform" the programming on the imported signals distributed to subscribers within the meaning of the Copyright Act of 1909 (476 F. 2d at 349).

Under the Teleprompter decision, therefore, the cable carriage of "distant signals" subjected the cable operator to full copyright liability to U.S. copyright owners, including injunctive action for infringement. The Teleprompter case is now before the U.S. Supreme Court and, if sustained, would provide complete copyright protection to U.S. copyright owners—and, hence, to Mexican copyright owners as well. Yet, despite the fact that the Court of Appeals decision in Teleprompter is the law today, numerous cable television systems in the southwestern United States continue to import "distant" Mexican signals without any accountability to the Mexican copyright owners whatsoever. While the Commission's cable carriage and program exclusivity rules (see pages 2–4, 10–11, supra) are designed to reach some compromise in this regard, as we point out above, the applicability of the Commission's cable carriage rules to Spanish-language programming is considerably different than it is to English-language programming (see page 2, supra), and the extent of the applicability—indeed, if any is contetaplated—of the program exclusivity rules to Spanish-language stations is considerably in doubt (see pages 10–11, supra).

The resulting injury to domestic (i.e., U.S.) Spanish-language broadcast stations is obvious—in exchange for unlimited and unfair competition from Mexico, domestic Spanish language broadcast stations have received little or no copyright protection for their programming. Moreover, the current Copyright Act does not permit such sacrifice at the expense of the copyright interests of foreign nationals; and as we discuss in more detail below, neither should the proposed legislation (S. 1361).

Other Spanish language businesses are also being "burdened" by the Commission's Mexican importation policy. In a letter to the Commission dated December 20, 1971 (copy attached), Azteca Films, Inc., a California corporation engaged in the business of Spanish-language feature film distribution in the United States, demonstrated the adverse effect that the Commission's policy would have on Spanish-language theatres operating in border states. Azteca notes that in several cases U.S. cable systems have imported such recent Mexican motion picture films that they have not yet been exhibited even in the U.S. Spanish language theatres, and that additional years would pass before these films would normally become available to domestic Spanish-language television stations (Azteca, page 5). This situation will become increasingly more frequent if the Commission's "Mexican importation" policy is allowed to continue. Spanish language theatre exhibitors in CATV areas would be forced to close their theatres, and film distributors, such as Azteca, no longer able to guarantee the first run and exclusive provisions essential to their operation, would be forced out of business.

Similarly, in a letter to the Commission dated December 21, 1971 (copy attached), the Asociación de Productores y Distribuidores de Peliculas Mexicanas (Mexican Motion Picture Producers Association), comprising the more than sixty Mexican companies whose business is the production of Spanish-language feature motion picture films, showed the consequences of the Commission's "importation" policy on the Mexican motion picture industry. As described by the Association on pages 1–2 of its December 21 letter, virtually every Mexican produced feature motion picture is licensed by American-based distributing companies (such as Azteca) to theatres located in U.S. communities with large Spanish speaking populations. Thereafter they are licensed to U.S. television stations also serving Spanish speaking communities. The fees received from the licensing of these pictures range from several thousand dollars, in large theatres for the most important motion pictures, to a few dollars from small town theatres and television stations. The total fees received by the Mexican producers for U.S. theatre and television licenses amount to between fifteen and fifty percent of the total revenues of the Mexican motion picture producers from the entire world, including the Republic of Mexico. The "receipts from within the United States are absolutely vital to the recovery of the cost of production of the said Spanish-language motion pictures, and, in turn to the continued existence of the Mexican motion picture industry, at least in its present form." (Association, page 2). While the greater part of such revenue within the United States derives from licenses to Spanish language theatres, an increasing portion comes from the licensing to U.S. television stations.

As briefly discussed above, related to this same problem, of course, is the matter of international copyright, and in this regard the reaction of the Mexican movie industry to the Commission's proposed policy is noteworthy:

"There is a vital and essential difference between the capture and dissemination of copyrighted material by cable television systems that originates within the United States and that which originates outside the borders of the United

States. In respect to copyrighted material licensed for broadcast within the United States, there is, in fact, a license for the copyright jurisdiction within which the cable dissemination is made. Furthermore, the copyright owner can negotiate a fee commensurate with the extent of the use.

"In respect to copyrighted material licensed for broadcast solely outside of the United States (in this case the Republic of Mexico only) the United States cable system is taking and using literary property within the United States which is not licensed for exploitation within the United States at all. The copyright owner cannot negotiate a license requiring the Mexican television station to pay any additional fee for the exploitation within the United States—a jurisdiction, in fact, not within the license granted to the Mexican station.

"Seemingly the rules of the Commission permit the United States cable system to take the property of the Mexican owner of the Mexican and United States copyrights without the necessity of anyone having obtained a license to exploit the material within the United States. This is particularly grave inasmuch as there is no apparent legal recourse, and there is no apparent impelling public interest need for such punitive regulations in respect to the motion picture industry of a friendly country." (Mexican Producers Association, December 21, 1971, letter to FCC, emphasis added).

Nevertheless, the Commission remains unpersuaded by the growing anxieties of Mexican copyright owners who feel that they have been treated unfairly. It is apparent that the Commission has totally ignored the international political consequences of its policy. In this connection, the Mexican Producers Association states at page 5 of its December 21 letter:

"It is the final opinion of the Association that the Commission has not taken into consideration at all the grave and unwarranted economic damage to an important industry of a friendly, neighboring country by permitting the taking of its property without compensation insofar as actual television exploitation within the United States is concerned and the endangering of its entire revenue from the United States market from both television and theatrical exploitation."

These important political questions and the international consequences of the out-of-hand rejection of these concerns should be carefully considered by the Congress before allowing the Commission to continue on a course that could severely impair if not destroy the economic well-being of numerous businesses in both the United States and Mexico.

The so-called, and much heralded, OTP-FCC Consensus Agreement which gave rise to the Commission's cable carriage and program exclusivity rules and the proposed section 111 of S. 1361, obviously was not concerned with the type of problem which we find to be substantial. Nor did we ever really expect it to be. Nevertheless, in the circumstances in which Spanish International now finds itself, we must conclude that no justification manifests itself which would warrant changing the current provisions of the Copyright Law to permit cable television systems an unfettered right to use the lawfully copyrighted works of friendly foreign nationals without the accountability to which they are entitled. There is no necessity or benefit received from giving cable systems preferential treatment in this manner. Cable television systems should be required to obtain licenses from foreign copyright owners just as do the movie theaters and broadcasters with whom they compete.

It is the marketplace which should decide the supply and distribution of program fare and not some regulatory scheme filled with virtually insurmountable administrative burdens, not to mention a multitude of uncertainties, vagaries and the like.

The compulsory licensing scheme envisioned by section 111(c) of the proposed copyright bill is no answer to this problem. We have already shown (see pages 11, 15–18, supra) the great burdens placed upon the Mexican copyright holder by the Commission's program exclusivity rules. In addition, there are the requirements imposed by the proposed bill, itself; for example, section 111(d)(3)(A). Indeed, sections 111 (c)(2) and (c)(2)(B) of S. 1361 do not appear to allow the unrestricted carriage of Mexican signals—i.e., without counting against the distant signal quota (as set forth in the definition of "adequate television service" in 111(e)(3))—as the Commission's current rules permit.

Spanish International Communications Corporation, therefore, urges that the Committee clarify the provisions of S. 1361 to exclude from the compulsory licensing provisions of section 111, the carriage of foreign signals, with the result that current copyright requirements will continue in effect so as to require cable television systems to secure a proper license before they could distribute in the United States program fare produced and licensed in Mexico.

More specifically, section 111(c) should be amended to add a subsection (5) which would state as follows:

"(5) Notwithstanding any other provisions of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed under the laws of a foreign nation that is a party to the Universal Copyright Convention of 1952, and embodying a performance or display of a work, is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, and no such transmission shall be subject to the compulsory licensing provisions of this section."

In addition, section 602(a) of S. 1361 should be amended to state that [the italicized portion is the suggested amendment]:

"(a) Notwithstanding any other provision of this Act, except as set forth in subsections (1), (2), (3) and (b) below, the importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work or any other literary, dramatic or musical work in the form of motion pictures or other audiovisual format that have been acquired abroad is an infringement of the exclusive right to distribute or perform the work under section 106, actionable under section 501. . . ."

It is important to emphasize that we are not asking for more protection than is available to other U.S. stations. Indeed, if the Commission had sought to limit the carriage and distribution of foreign signals as it has in teh case of English-language stations (see pages 2–4, *supra*), additional relief might not be required here. The Commission, however, has not seen fit to treat U.S. foreign-language stations on a par with English-language stations and thus we are left with no protection at all.

RICHARD H. DUNLAP,

Los Angeles, Calif., December 20, 1971.

Mr. BEN F. WAPLE,
Secretary, Federal Communications Commission,
Washington, D.C.

DEAR MR. WAPLE: This letter is submitted on behalf of Azteca Films, Inc., a California corporation, having its head office in Los Angeles, California, and with four other regional offices. The business of Azteca Films is the distribution within the United States of Spanish language feature motion picture films most of which are produced in the Spanish language within the Republic of Mexico. Such films are licensed to theatres within the United States catering to Spanish speaking persons and to domestic television stations serving the large Spanish speaking communities within the United States.

A substantial portion of such Spanish speaking communities are located within the states adjoining the Republic of Mexico, i.e.: Texas, New Mexico, Arizona and California. Each of these states contain large populations of Spanish speaking Americans of Mexican descent.

For many years Azteca Films has served the Spanish-American populations in this market by licensing its Spanish language films to theatres and to television stations within the said border area. Owners of domestic Spanish language television stations—in particular the small UHF stations catering to the Spanish language communities—have advised Azteca Films that the mainstay of their Spanish language programming consists of Spanish language Mexican-produced films they license from Azteca Films.

It has recently come to the attention of Azteca Films that the Commission has permitted, and by letter to Congress dated August 5, 1971 proposes to continue to permit, community antenna television systems to import without resrictions the signals of Mexican-based Spanish language television stations into markets not within the top 100 markets and into the top 100 markets with some limitations.

It is the considered opinion of Azteca Films that said unrestricted importation of Spanish language signals, particularly the unrestricted importation of Spanish language feature films by CATV systems into the United States, will destroy the independent Spanish language television broadcasting industry in the United States. Such a policy cannot serve the public interest inasmuch as the United States Spanish American population is certainly entitled to be served by a healthy and effective United States-based television industry attuned to the needs and aspirations of the Spanish-American communities in the United States.

Spanish-language television programs originating in Mexico are created for and directed to the Mexican people in Mexico and the broadcasting stations are closely controlled by the Mexican government. The program content is supervised by the

Mexican government and the Mexican television stations are required to broadcast Mexican government originated programs imbued with Mexican government points of view on a daily basis. Some portion of this material may be assumed to be of less interest and of less benefit to the Spanish-American populations within the United States than Spanish language material selected by, and broadcast by, United States-based television stations.

Inasmuch as the decisions of the Commission in respect to the carriage of signals by its licensees, including CATV operations, are based upon the public interest, Azteca Films believes that a brief analysis of the effect of the unrestricted permission granted to CATV operations to carry into the United States foreign language programs originating in the Republic of Mexico is in order.

As illustrative of general conditions along the Mexican-United States border, Azteca Films directs the attention of the Commission [illegible] the situation existing in the Southern Rio Grande River Valley in Texas.

Valley Cable TV, Harlingen, Texas, directly and through microwave connections, operates its CATV systems in the Texas communities of Pharr, McAllen, Mission, Edinburg, San Juan, Alamo, Westlaco, La Feria, Donna, Mercedes, Harlingen, San Benito, Raymondsville and Brownsville, all of which contain a high percentage of Spanish-speaking persons and homes. Said Valley Cable TV presently is importing and providing to its subscribers the following full time Spanish language signals from Mexico:

XHAV-TV- Matamoros, Mexico
XHX-TV—Monterrery, Mexico
XET-TV—Monterrery, Mexico
XESB-TV—Monterrery, Mexico.

In addition said Valley Cable TV carries, only on a part time basis, the signals of your licensee, KWEX-TV, San Antonio, Texas, a Spanish-language station, belonging to Spanish International Broadcasting Company. Southwest CATV, Inc., a company affiliated with Valley Cable TV and the licensee of the CARS system which services the said communities, on December 10, 1970, requested the Commission to renew its Community Antenna Relay Station licenses indicating that it desired to continue to provide the above described signals to its subscribers.

From written information Azteca Films has obtained, and which it believes to be true, it appears that Valley Cable TV is experiencing a surging growth, much of which is believed to be the result of the importation of the Spanish language signals from the Mexican stations in Monterrey, Mexico.

The effect of the different business entities affected by said unrestricted importation of signals in the Spanish language from Mexico is commented upon immediately below.

1. *Valley Cable TV.* There would seem to be no doubt but that said permission presently benefits the stockholders of Valley Cable TV.

Two of the Monterrey, Mexico stations picked up by Valley Cable TV broadcast the programs of the two existing Mexican nation-wide television networks and the third Monterrey station broadcasts the best franchised independent material available in Mexico. Said Mexican-originated signals include many feature motion pictures in the Spanish language each week, the same feature motion pictures for which the exclusive exploitation rights for the United States have been acquired by Azteca Films for licensing within the United States.

It is the belief of Azteca Films, based upon its own experience and upon interviews with other owners of right to exploit Spanish language films in the United States, that Valley Cable TV makes no arrangements for the use of said Spanish language motion picture films, but, in fact, transmits them to its subscribers via microwave at no cost to itself for said material and without seeking or obtaining permission for such use.

At this point it is pertinent to point out vital differences between a domestic CATV system's use of domestically broadcast literary property and a domestic CATV system's unauthorized and unlicensed use of literary property broadcast from Mexico.

When a domestic CATV system carries literary property originating with a domestic station, the owner of said laterary property has licensed the use of said material to the domestic station. The owner can have access to the public records concerning the broadcast range of the said station, including its CATV connections, and can negotiate a license fee commensurate with the extent of the use. In the case, however, of a domestic CATV system carrying literary property originating from a Mexican station far into the United States to its subscribers, the owner of the United States exploitation rights to said material, is deprived of his property without compensation. Said owner cannot protect even its United States licensees, to which it may have previously licensed the exclusive right to perform via televiison, the same property which the domestic CATV system now brings into the market from outside the United States, free of cost and without license.

With the unrestricted permisison given by the Commission to Valley Cable TV to import as many Spanish language signals from Mexico as it may elect, there is small or no incentive to Valley Cable TV to carry domestically originated Spanish language signals.

Azteca Films has in its possession written information, dated January 29, 1971, to the effect that Valley Cable TV was carrying the San Antonio, Texas Spanish language television station, KWEX–TV, on a full time basis only in the towns of Alice and Falfurrias among the fourteen, or more, communities it was serving with Spanish language signals. It seems quite apparent that Valley Cable TV has been largely by-passing the Spanish language programs transmitted by the San Antonio station in favor of the Mexican originated signals. Valley Cable TV seemingly has elected to completely by-pass Spanish language signals originating from other domestic stations which are available to it.

There is another reason why Valley Cable TV elects to import said Mexican originated signals instead of carrying domestically originated Spanish language programs. The two Mexican television network stations in Monterrey, whose signals are imported and carried by Valley Cable TV, include among their programs very new and important Mexican feature motion picture films. Azteca Films has been informed that Valley Cable TV has imported from Monterrey and carried to its subscribers, Mexican motion picture films of such recency of production that they have not yet been exhibited even in the numerous Spanish language theatres in the United States, operating within the communities served by Valley Cable TV. Motion picture films of this recency would not be licensed by the owners thereof for broadcast by domestic United States Spanish language television stations for, perhaps, two to three years following the theatrical exhibition of the same in the United States, which is a policy similar to that common within the greater English language motion picture film market.

The consequence is that Valley Cable TV is attracting subscribers in the Spanish language community by offering to such subscribers feature motion pitcure films obtained from Mexican originating signals, before such motion pictures have been made available to Spanish language moton pictures in theatres along the border and before such motion pictures are available for licensing by the United States-based Spanish language television stations.

It is worth remarking that the Commission's rules in this area permit the Spanish language subscribers to the Valley Cable TV service to obtain benefits that no English language community obtains from direct, or cable, television. Such unforeseen benefit consists of the availability of feature motion pictures films via cable before those films are available to the community in theatres or by direct television transmission. The above mentioned inducements to Valley Cable TV, and other similarly situated border CATV systems, to utilize Mexican signals rather than domestic Spanish language signals, causes irreparable damage to both the owners of the United States rights to the literary property (motion pictures and other filmed material) which are imported by the border CATV systems and to the domestic television stations attempting to serve Spanish American communities with domestically produced programs.

2. *United States based television stations transmitting in the Spanish language*

It has been stated above that Valley Cable TV, and similarly situated border CATV systems, have no incentive and small interest in carrying the signals of domestic television stations broadcasting in the Spanish language when they are permitted to import from Mexico all of the Mexican network signals as well as the best Mexican franchised Spanish language programs.

The domestic Spanish language television stations must license Spanish language filmed material, including Spanish language feature motion picture films, from the owners of the rights to exploit the same in the United States. They must pay a license fee, and they must await availability of the feature motion picture films until those films have been exhibited in the Spanish language theatres in the community.

The result is that the border CATV systems supply to their subscribers recent Spanish language films, and other taped programs, the signals of which are imported from Mexico without payment or permission (other than that granted by the Commission's rules), while the domestic stations cannot program the same films and other material until some later time and after having paid a license fee for such material to the owners of the rights.

It follows that such border CATV systems increasingly will ignore the carriage of domestic Spanish language stations to the economic damage of said domestic stations.

3. *Owners of rights to exploit in the United States Spanish language filmed and taped material*

Azteca Films is one of several companies that have spent millions of dollars to acquire the rights to exploit within the United States theatrically and by means of television Spanish language motion picture films principally from the Republic of Mexico. It has spent a very substantial additional sum in making negatives and prints of said films. It maintains a large organization to license the rights to exploit such films.

The principal licensors of such films for television are the VHF and UHF stations within the states of Texas, New Mexico, Arizona and California which broadcast in the Spanish language. Such said stations obtain such films from Azteca Films, and from other owners of rights to exploit Spanish language films in the United States, by paying a negotiated license fee to Azteca Films and to others. Azteca Films has invested in the said rights for the United States to such said films under the belief that the market for such product was stable and was increasing. Azteca Films has considered that the number of Spanish language domestic stations, both VHF and UHF, would increase substantially to cover areas within said border states not yet covered by Spanish language programming, and that the economic strength of such stations would improve as service improved.

Azteca Films believes that the Commission's present regulations, permitting CATV systems, with microwave connections, to import signals from Mexican stations and to carry such signals to subscribers will bring to an end any prospect of the growth and of the economic strengthening of domestic Spanish language stations. This, of course, will greatly inhibit the possibility of Azteca Films of recovering its investment, and will also bring to an end the purchase by Azteca Films, and others, of rights to exploit Spanish language films in the United States. In this event the domestic Spanish language stations no longer will be able to obtain licenses for the Spanish language films that are today a vital part of their Spanish language programming. Such will have a substantial economic impact as well on the entire Spanish language motion picture industry of Mexico which depends to a considerable degree on patronage by Spanish language communities within the United States for recovery of the production costs of its motion picture films.

5. *Summary—The Public Interest*

It is the opinion of Azteca Films that the Commission has not taken into consideration to a sufficient degree the substantial damage occasioned by the Commission's rules permitting border CATV systems to pick up, import and disseminate to its subscribers within large areas of the United States broadcast signals from Mexican stations carrying filmed and taped material intended for the Spanish speaking communities in Mexico itself. Without commensurate benefits, the following harm can be described.

(a) The domestic Spanish language stations cannot prosper or expand their markets when exposed to the flood of Spanish language television material picked up and imported from Mexico by the border CATV systems and disseminated by microwave over large areas.

(b) United States advertising sponsors are precluded from reaching a potentially wide market by the present rules which induce the CATV systems to utilize Mexican originated Spanish language signals rather than domestic Spanish language signals. If the CATV systems were precluded from picking up the Mexican signals, such systems would pick up the many available domestic Spanish language stations, the consequence being that the advertisers would reach a much wider audience. In turn this would permit the domestic Spanish language stations to increase their fees and be able to provide better Spanish language programming.

(c) The owners and distributors of Spanish language, Mexican-produced, feature motion picture films have invested very substantial sums in reliance on a United States market for their rights. The unlicensed, free importation of this same material by border CATV systems is rendering these rights worthless.

Such owners cannot protect even the domestic television stations to which they have licensed, for a reasonable fee, such material against the prior, free dissemination of such material by the border CATV stations throughout the expanding microwave areas.

(d) The cable television industry is permitted by the present rules of the Commission to receive a free windfall of copyrighted material from a foreign country to the substantial damage of many Mexican and American interests without fulfilling any purpose which could not be fulfilled at this time from domestic sources of Spanish language programs. For example Azteca Films would be willing to license Spanish language films to Valley Cable TV for reasonable license fees.

(e) Under the present rules the Spanish American communities are exposed to a flood of foreign broadcasts from Mexico, none of which is under the surveillance of the Commission and some part of which is designed to politically influence the Spanish speaking audiences for which such Mexican broadcasts are intended. The commercial attractiveness of much of the Mexican-originated signals make it competitively difficult for programs produced and originated by Spanish American groups to be disseminated inasmuch as the border CATV systems show little interest in carrying domestic Spanish language stations.

In summary, it would seem to Azteca Films that the public interest would be served by prohibiting the importation into the United State by cable television of the signals of Mexican based television stations, thereby inducing the border cable television systems to rely on the available domestically based Spanish language programming and feature films.

Respectfully submitted,

RICHARD H. DUNLAP,
Attorney for Azteca Films, Inc.

RICHARD H. DUNLAP, ATTORNEY AT LAW,
Los Angeles, Calif., December 21, 1971.

Mr. HENRY GELLER,
Federal Communications Commission,
Washington, D.C.

DEAR MR. GELLER: Yesterday I mailed to you a copy of a letter to the Commission on behalf of Azteca Films, Inc., and today I enclose a copy of a second letter, this one on behalf of the Mexican Motion Picture Producers Association.

Both letters attempt to explain the substantial economic harm being done to the Mexican motion picture and television industry, and to the American Spanish language VHF and UHF sations, by the Commission's regulations permitting the importation of Mexican television signals into the United States by border cable television systems.

I hope I have been successful in putting into readable language the fact that a prohibition of such importation would not deprive the border cable television systems of anything other than an inequitable time priority over domestic stations inasmuch as the last named, in fact, license the same material for broadcast at a somewhat later date. Such material is, and would continue to be, available to the cable systems. However the other side of the coin—the damage to all other entities aside from the cable systems—can be corrected only by requiring (by deprivation of the imported product) such cable systems to utilize the domestic Spanish language signals.

It is understandable that Valley Cable TV will use all its resources to continue to enjoy the present unwarranted and unnecessary bonanza; however I hope that these documents will show that the slight additional benefit to Valley Cable TV made available by such importation permission will be shown to be wholly outweighed by the grave economic injury to all the other entities involved in this problem.

I still appreciate your attentive and courteous consideration of this at the time of our personal conference in your office some weeks ago.

Very truly yours,

RICHARD H. DUNLAP.

RICHARD H. DUNLAP, ATTORNEY AT LAW,
Los Angeles, Calif., December 21, 1971.

Mr. BEN F. WAPLE,
Secretary, Federal Communications Commission,
Washington, D.C.

DEAR MR. WAPLE: This letter is written on behalf of Asociacion de Productores y Distribuidores de Peliculas Mexicanas (Mexican Producers Association), a formal association of the more than sixty Mexican corporations, whose business is the production of Spanish language feature motion picture films, and which is located in Mexico, D.F., Mexico. Its content and its submission have been authorized by Sr. Fernando de Fuentes, President of the Association, and its Board of Directors. Reference to the said Mexican Producers Association will be made hereinafter to the "Association".

For over forty years Mexican motion picture producers have been producing feature motion picture films for exploitation in the many countries and areas of the world in which the Spanish language is spoken. For many years the producer members of the Association have been producing between 70 and 120 new feature length, Spanish language, commercial motion pictures, all of which are duly copyrighted in Mexico and in the United States of America. Virtually every such feature motion picture is licensed by American-based distributing companies to theatres located within the large Spanish speaking communities within the United States, and later to United States VHF and UHF television stations serving such Spanish speaking communities within the United States.

The license fees received from the licensing of the said motion pictures range from several thousand dollars per exhibition license in connection with the first exhibition in large theatres in the United States of the most important motion pictures to a few dollars per license received from licenses to small town theatres and VHF or UHF television stations in the United States. The total fees received by the Mexican motion picture producers, through their United States distributors, for such licenses of such copyrighted motion pictures within the United States, amount to between fifteen and fifty percent of the total revenue received by said Mexican motion picture producers from the entire world, including the Republic of Mexico. Said receipts from within the United States are absolutely vital to the recovery of the cost of production of the said Spanish language motion pictures, and, in turn to the continued existence of the Mexican motion picture industry, at least in its present form.

The greater part of such revenue from within the United States derives from licenses to Spanish language theatres serving Spanish speaking communities in the United States. However an increasing portion of such revenue derives from the licensing of such Spanish language feature motion pictures to United States-based VHF and UHF television broadcasting stations which serve the Spanish-American communities in the states of Texas, New Mexico, Arizona and California.

The Association has become acutely aware of a practice, apparently approved by the Federal Communication Commission of the United States, which permits the importation of Mexican television signals from Mexican television stations into the United States and their dissemination to ever-widening markets within the United States by means of expanding and inter-connected cable television systems. No permission is requested, and no license fee is paid, by such cable television systems for the unauthorized taking and exploitation for economic gain of the Spanish language motion pictures belonging to the producer-members of the Association.

The Association is informed that an American corporation located in Harlingen, Texas, and known as Valley Cable TV, is capturing signals broadcast from three Mexican stations in Monterrey, Mexico and from one Mexican station in Matamoros, Mexico and disseminating these signals to many thousands of Spanish-speaking homes, via microwave connections, in South Texas.

The Association, respectfully but urgently, calls the following factors in connection with this unlicensed use of this Mexican and United States copyrighted motion picture film property to the Commission's attention.

1. The filmed and taped material broadcast by the four Mexican stations in Mexico is broadcast under licenses delimiting the territory and use to be made of such material. In no case does the license include any part of the United States.

2. Much of the filmed material broadcast by the Mexican stations consists of feature motion pictures belonging to the producer-members of the Association. Many of said motion pictures are of very recent production date and the Mexican television stations broadcast them even before their theatrical exploitation within the United States.

3. All of said motion pictures are also licensed later and separately for television exploitation within the United States to various United States entities, in some cases distributors and in many cases directly to United States television stations serving the Mexican-American, Spanish speaking communities in the states of the United States bordering the Republic of Mexico.

4. Valley Cable TV, and other similarly situated cable television systems located on the United States side of the Mexican-American border, obtain no license from the owners of the copyright of such filmed and taped material either in Mexico or in the United States to exploit such copyrighted material.

5. There is a vital and essential difference between the capture and dissemination of copyrighted material by cable television systems that originates within the United States and that which originates outside the borders of the United States. In respect to copyrighted material licensed for broadcast within the United States, there is, in fact, a license for the copyright jurisdiction within which the cable dissemination is made. Furthermore the copyright owner can negotiate a fee commensurate with the extent of the use.

In respect to copyrighted material licensed for broadcast solely outside of the United States (in this case the Republic of Mexico only) the United States cable system is taking and using literary property within the United States which is not licensed for exploitation within the United States at all. The copyright owner cannot negotiate a license requiring the Mexican television station to pay any additional fee for the exploitation within the United States—a jurisdiction, in fact, not within the license granted to the Mexican station.

Seemingly the rules of the Commission permit the United States cable system to take the property of the Mexican owner of the Mexican and United States copyrights without the necessity of anyone having obtained a license to exploit the material within the United States. This is particularly grave inasmuch as there is no apparent legal recourse, and there is no apparent impelling public interest need for such punitive regulations in respect to the motion picture industry of a friendly country.

6. The Association understands the desire of the Commission to assist the rapidly expanding United States cable television industry and understands the aim of the Commission to bring Spanish language entertainment to the Spanish speaking, Mexican-American communities within the United States. It is the opinion of the Association, however, that the Commission has not adverted to the fact that such entertainment is presently available to the border cable television systems from Spanish language full time broadcasts originating within the United States. For example, Valley Cable TV has access to KWEX–TV, San Antonio, Texas, a full time, high-quality Spanish language station, and has access, via microwave, to other excellent and growing Spanish language, United States-based television stations as well. To adequately serve the Spanish language communities reached by Valley Cable TV, and other similar situated border cable systems, the importation of Mexican originated signals is not necessary.

It is the further opinion of the Association that the Commission has not adverted to the actual and potential harm done to the Commission's own domestic VHF and UHF Spanish language station licensees by permitting border cable television systems to import and disseminate widely Spanish language programs from Mexico instead of utilizing fully the excellent Spanish language programming originating within the United States. The Association does not need to direct the Commission's attention to the importance of supporting its domestic VHF and UHF Spanish language stations.

It is the final opinion of the Association that the Commission has not taken into consideration at all the grave and unwarranted economic damage to an important industry of a friendly, neighboring country by permitting the taking of its property without compensation insofar as actual television exploitation within the United States is concerned and the endangering of its entire revenue from the United States market from both television and theatrical exploitation.

In connection with this last statement—the endangering of its entire revenue from the United States—the Association has stated hereinabove that recently produced Mexican motion pictures have been imported from Mexican broadcasts by Valley Cable TV and disseminated to the South Texas public before those motion pictures have had even a first exhibition in some South Texas Spanish language theatres. The said theatre operators have advised that they will have to close their theatres if such a practice continues. If such a problem existed only in South Texas the economic harm to the Association's producer-members would be serious enough; however the actual and increasing wide dissemination by microwave of cable-transmitted programs could mean the death blow to Spanish language theatrical exploitation of motion pictures in the United States.

8. In no sense does the Association desire to restrict or to restrain the access by Spanish-speaking, Mexican-American communities to top quality Spanish language film and tape material, including the best Mexican-produced Spanish language feature motion pictures.

There is, in the Association's opinion, one, and only one, equitable and wholly reasonable means of achieving such public interest aim. That is for the Commission to prohibit the unlicensed importation into the United States of Mexican television signals by United States based cable television. This will cause such cable television systems to fully utilize the programs in the Spanish language originating from VHF and UHF stations within the United States.

At this point it is important to note that such domestic VHF and UHF stations, in fact, obtain by license much of the same film and tape Mexican material which Valley Cable TV imports, free of license, at a prior date. It is equally important to note that such material is, and would continue to be, available to Valley Cable TV from such domestic VHF and UHF stations although at a somewhat later date.

Such a prohibition will also prevent the serious and damaging economic harm presently caused to the Mexican motion picture and television industry.

RICHARD H. DUNLAP,
Association's Attorney.

ADDENDUM TO STATEMENT FOR SPECIAL LIBRARIES ASSOCIATION REGARDING LIBRARY PHOTOCOPYING PROVISIONS IN THE REVISION OF THE COPYRIGHT LAW, S. 1361, AS PRESENTED ON JULY 31, 1973

A proposed amendment to § 108(d) of S. 1361 was presented by the Association of Research Libraries (ARL) and the American Library Association (ALA) at the hearings on July 31, 1973. Because SLA was not aware of the proposed amendment before the hearing, I was not able to reply for SLA when the Committee's Chief Counsel asked if the ARL–ALA proposal was acceptable to SLA. Since then, I have communicated with members of the SLA Board of Directors by means of a telephone conference call.

In this Addendum, SLA is presenting our reply plus comments on several other items in S. 1361 which are pertinent to our position as well as pertinent to our comments on the ARL–ALA proposed amendment. Our comments are presented in the sequence:

1. SLA Adherence to the Position.
2. SLA Opinion Regarding the Proposed ARL–ALA Amendment.
   2.1 In relation to proposed § 108(d)(1).
   2.2 In relation to proposed § 108(d)(2).
   2.3 In relation to the Qualifying Clause of proposed § 108 and to existing § 108(a) (1) and (2).
   2.4 Summary.
3. Support for proposed National Commission on New Technological Uses of Copyrighted Works.

1. *SLA Adherence to its Position.* SLA maintains as its first preference, the position as presented in our written statement (dated July 26, 1973) as presented to the Subcommittee. To restate our position briefly, it is one which seeks to reach an intermediate position of accommodation between the seemingly irreconcilable positions of publishers and literary authors on the one side, and the positions of some parts of the library and educational communities on the other. We have suggested that there be a provision for the payment of a per-page royalty on photocopies of copyrighted works at a rate of "cents-per-page." Such an arrangement has precedence already in the proposed Copyright Act in §§ 111, 114, 115 and 116 (relating to cable transmissions, sound recordings, etc.) A Royalty Tribunal of

the type proposed in Chapter 8 of the Copyright Revision Bill could assure that the per-page royalty rate is reasonable. We believe that a range of $0.01–$0.05 should be both fair and adequate. In addition, the publishers must themselves establish the agency for the collection and for the determination of pro rated payments to each publisher (in an ASCAP-style operation).

2 *SLA Opinion Regarding the Proposed ARL–ALA Amendment.* SLA could *only* support the proposed amendment to § 108(d) if certain modifications were to be introduced. Some of the modifications refer to the specific wording as submitted; other modifications refer to the relationship of § 108(d) to § 108(a) (1) and (2).

2.1 SLA objects to the unnecessary inclusion of the word, *further*, in § 108(d) (1) of the proposed amendment:

"(1) The library or archives shall be entitled without *further* investigation, to supply a copy of no more than one article or other contributions. . . ."

Inclusion of the word, *further*, can mean that some other investigation is required. If the intent of the proposed § 108(d)(1) is to implement the concept of "fair use" (§ 107) the inclusion of the word, *further*, can result in interpretations which will inevitably lead to delays in service to the user.

Although the proposed ARL–ALA substitute for the existing § 108(d)(1) states library or archives entitlement to supply a copy of "no more than one article or other contribution to a copyrighted collection or *periodical* issue . . . (emphasis supplied)," it is principally periodical articles that must be photocopied in or for most special libraries. Moreover, time is usually of the essence. Hence, the language of § 108(d)(2) in the proposed substitute requiring "reasonable investigation" for obtaining reprints or permissions to copy is a procedure that might cripple the operations of most special libraries. A similar "procedural" requirement for obtaining "an unused copy" presently exists in § 108(d)(1) of S. 1361. It is certain that most special libraries would prefer either *no* requirement to seek permissions or reprints of periodicals especially, or, preferably, some means of paying for all copying that might exceed a statutory limitation on "fair use" however finally defined. In the event that multiple copies might be required, such a proposed payment would also provide equitable payment to the publishers.

2.2 SLA objects to the underlined portions of the proposed § 108(d)(2).

"(2) The library or archives shall be entitled to supply a copy or phonorecord of an entire work, or if more than a relatively small part of it, *if the library or archives has first determined*, on the basis of a reasonable investigation that a copy or phonorecord of the copyrighted work cannot readily be obtained *from trade sources*."

The second italicized words, *from trade sources*, are even broader than the existing § 108(d)(1) in S. 1361, "from commonly known trade sources," and therefore the proposed amendment is even less satisfactory. "Trade sources" is a term used to include second-hand book stores, antiquarian book dealers, etc. If the book is "out-of-print" (that is, when the original publisher's stock is exhausted), the original copyright owner is not deprived of any income if a copy is purchased from a second-hand book dealer. The mechanism of using "Books-In-Print" (published by the R. R. Bowker Co., a Division of Xerox, New York) is a simple and straight forward mechanism. The information in "Books-In-Print" is supplied by the publishers themselves. (There is no comparable compilation for periodicals.)

The first italicized words, *if the library or archives has first determined*, will result in very bad delays in our opinion. The larger research libraries (from whom most photocopies are requested) have, for a number of years, complained publicly of insufficient staff even to service requests for photocopies of only a few pages. There is only a limited number of librarians (in the larger research libraries) qualified to address intelligent queries to "trade sources."

2.3 Deletion of the Qualifying Clause in the first sentence of the proposed § 108(d): ". . . whose collections are available to the public or to researchers in any specialized field."

This language simply emphasizes a qualification already stated in § 108(a)(1) and § 108(a)(2) that "(1) . . . reproduction or distribution is made without any purpose of direct or *indirect commercial advantage;* (emphasis supplied) and (2) The collections of the library or archives are (i) *open to the public* . . . (emphasis supplied)."

Without further definition of the meaning of this existing language, it must be pointed out that a majority of special library operaitons *are* conducted for purposes of "indirect commercial advantage" for parent business or industry. Moreover, a majority of these libraries are not usually "open to the public" nor to "researchers in any specialized field" if this language is further interpreted to mean specialized research of a *competitive* nature as now defined in Clause (ii) of § 108(a)(2) of S. 1361, 93rd Congress.

Hence, the immediate concern of the Special Libraries Association in the § 108 limitation on exclusive rights is the exception from this limitation by virtue of the *character* of most special libraries—a point not heretofore clearly expressed to Congress or widely understood by the other library associations who have a wider public constituency. However, it is understood that it would be totally inequitable to seek a further limitation on exclusive rights by insisting upon the deletion of § 108(a) (1) and (2) language as it apparently applies to special libraries. But we would insist upon the deletion of the "access" requirement that is repeated in the ARL/ALA proposed substitute for § 108(d)(1).

2.4 In summary, it is for the above reasons that Special Libraries Association is seeking to reach an intermediate position of accommodation between the publishers and literary authors on the one hand, and other library associations on the other hand by way of establishing some method of collecting per-page royalty copying fees in excess of "fair use" copying in special libraries—however, "fair use" is finally defined in § 107 of S. 1361.

In the view of this Association, it would be far more equitable for both publishers and libraries to establish a royalty or licensing mechanism that would free both parties from the onerous routine of seeking reprints or permissions before copying out-of print works.

3. *Support for Proposed National Commission.* Proliferation of new, and ever more specialized periodicals and other publications at constantly increasing subscription rates is a major cause of decreasing number of subscribers. This proliferation of new periodicals began after World War II in the same time period that photocopying equipment became more commonly available and more widely used. All decreases in subscription income cannot be ascribed to photocopying. Publishers themselves have not applied appropriate "birth control" or management evaluation measures to their own products. Unfortunately, no unbiased data are available to sort out and evaluate the resulting claims and counter claims.

Special Libraries Association wishes to emphatically state its support of Title II of S. 1361 for the establishment of a National Commission on New Technological Use of Copyrighted Works.

Special Libraries Association is aware of the many contradictory points of view and problems in interpretation that have been submitted to the Subcommittee. The Association wishes to record its commendation of the Subcommittee for its careful consideration and assessment of the many aspects of the copyright field.

F. E. McKENNA,
Executive Director.

PIERSON, BALL & DOWD,
August 1, 1973.

Hon. JOHN L. McCLELLAN,
U.S. Senate,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR McCLELLAN: It is my understanding that you have scheduled hearings this week on S. 1361 before the Senate Subcommittee on Patents, Trademarks and Copyrights and that you will be hearing from a cross-section of representatives of the various media on the copyright questions to which the proposed legislation is addressed.

I am writing to you as Chairman of that Subcommittee with the request that the substance of this communication be taken into consideration in your deliberations. My communication is addressed to you in my capacity as Chairman of the Board of Sterling Communications, Inc. whose wholly-owned subsidiary, Sterling Manhattan Cable Television, Inc. operates the cable television system in the southern half of Manhattan Island, the largest cable system in the nation. Time Inc., of which I am a vice president, in turn owns almost 80% of Sterling Communications.

As you are well aware, although segments of the cable industry still have serious reservations, the industry generally has been committed for some time to supporting the concept of payment of a reasonable fee for copyrights. You are also aware, of course, of the recent judicial decisions bearing upon this question and the fact that they lend support to the position that cable systems are not and should not encompass and be liable for copyright payments particularly where they only carry broadcast signals from local television stations. It is not my intention in this letter to argue this point further beyond noting it and pointing out that inevitably these added costs for copyright will have to be absorbed by the cable subscriber. Thus, we will contribute to a situation where the viewer who subscribes to cable, very often as a matter of necessity, will pay more for "free" over-the-air signals simply because the over-the-air operations cannot deliver to him an acceptable service in either diversity or quality. It may well be that such fees should be paid by the broadcast stations themselves in return for their enlarged audiences.

However, the cable industry has advanced beyond these thoughts and my basic purpose in writing at this time is to bring to the attention of you and the other members of your committee the extent of the very heavy burden already placed on cable by various government regulatory bodies and to ask that you bear these amounts in mind in setting the levels for copyright fees under S. 1361. For instance, our company, Sterling Manhattan Cable Television, already pays the equivalent of 15% of its gross subscriber revenues as a result of governmental regulations. New York City charges a fee of 5% of subscriber revenues while the State has recently added an additional fee of 1%. The FCC, as you know, requires a payment of $0.30 per subscriber and New York State regulation authorizes payment of a fee to landlords in principle and past practice has led to an average of an additional 2.3% for that purpose. In addition to our franchise fee, we are required to pay a business real estate tax that amounts to another 7% and additional amounts to both the city and state as business income taxes regardless of our overall profit and loss.

Your proposed bill does establish a graduated scale for the copyright fees. But, in fact, a company of the size of Sterling Manhattan, which grosses approximately $5 million a year in subscriber fees, will not be substantially aided by the proivsions in S. 1361 for payments at 1% and 2%. Its practical rate of payment will be the maximum of 5%. This means that the copyright payment on the approximately $5 million revenue we receive a year will amount to an additional $250,000 annually. Thus, our company will be paying a total of approximately $1 million or 22% of our subscriber income off the "top" of our revenue before we begin meeting our own expenses, much less obtaining a profit.

Senator, you and your associates will recognize that it is extremely difficult to operate a successful business on this basis. In fact, Sterling Manhattan Cable Television has been operating at a substantial loss since its inception in 1965. It has accumulated losses of over $17 million. In its last fiscal year, it lost some $5 million on operations and another $5 million in a write-off of capital assets.

Our company has been engaged in cable television because of our faith in the future of the industry and it is our intent to continue to develop the southern Manhattan franchise. But at the same time, I am compelled to suggest to your committee that the mounting burdens placed on this industry by government regulation will greatly handicap our continued development in Manhattan and will certainly act as a general deterrent to development of cable television in the more densely populated areas of the country. That depressing effect on the future of cable may be exactly the goal that vested interests in the media are seeking. But I would note that the development of cable in this country has been recognized as a matter of public interest by most members of the Congress and declared officially a goal of public policy by the Federal Communications Commission.

Thus, I ask that you review carefully the schedule of payments listed in the bill before your committee. I earnestly urge you to reduce the levels now contemplated to a maximum of three percent. Under no circumstances could we possibly conceive of a revision upward as will probably be suggested by some of the witnesses who will appear at your hearings.

I am of course prepared to respond to any questions you or your associates may have in regard to the matters covered in this letter.

Sincerely yours,

BARRY ZORTHIAN,
Chairman of the Board,
Sterling Communications, Inc.

TELEPROMPTER CORPORATION,
New York, N.Y., August 9, 1973.

Re: S. 1361

Hon. JOHN MCCLELLAN,
Chairman, Senate Subcommittee on Patents, Trademarks, U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: I have followed with great interest your recent hearings on S. 1361. Because I believe that the resolution of this issue will have a profound effect on whether or not the concept of broadband communications and community CATV expression reaches their full potential, I have decided to write you stating my views on behalf of TelePrompTer.

First, let me begin by stating that TelePrompTer is in favor of an omnibus statutory copyright provision which would impose reasonable copyright fees on operating CATV systems. We are in favor of passage of S. 1361 if provision is made for compulsory licensing of CATV systems for carriage of broadcast signals, in accordance with FCC rules and regulations, and if there is a statutory system of fees of the nature set forth in the statute. However, in view of the comprehensive nature of FCC regulation in this area, the regulatory features contained in Section 111 of S. 1361 can and should be deleted.

S. 1361 currently contains a formula of statutory fees based on a sliding scale ranging from 1 to 5%. Subject to periodic review of this formula, we note at the outset that such a level is on the high side and imposes substantial economic burdens on CATV development. Illustrative of the severe impact of the proposed fee schedule of TelePrompTer is the fact that the copyright payments due for the first six months of 1973 would have amounted to approximately 17% of TelePrompTer's after tax CATV income for that period.

As you know, TelePrompTer is the leader and innovator in what is now the CATV industry but what has promise of becoming a new "broadband communications" industry serving all parts of the country, both rural and urban. Since the industry is heavily capital-intensive and since TelePrompTer and the rest of the industry are financed in large part by the public equity market, an impact on income of the magnitude that the proposed fee schedule of S. 1361 would impose would have a highly leveraged, adverse effect on TelePrompTer's ability to finance its future plans. As a result, TelePrompTer would not be able to finance and build systems, and deliver on the promise of broadband and community-oriented communications, as it is now in the process of doing. Although I most definitely agree in principle that a comprehensive bill containing a sliding fee schedule is just and should be implemented, I respectfully submit that a fee schedule at least 50% lower than that presently contemplated by S. 1361 would be just and appropriate.

Very truly yours,

WILLIAM J. BRESNAN, *President.*

U.S. SENATE,
COMMITTEE ON COMMERCE,
Washington, D.C., July 31, 1973.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Russell Building, U.S. Senate.

DEAR MR. CHAIRMAN: Thank you for giving me the opportunity to present my views with respect to certain aspects of S. 1361, a revision of the Copyright Law, title 17 of the U.S. Code.

I am pleased to submit for inclusion in the hearing record some brief comments on certain provisions in the bill which are of substantial interest to me.

Sincerely,

JOHN V. TUNNEY.

STATEMENT BY SENATOR JOHN TUNNEY

Mr. Chairman: I welcome these additional hearings because: hopefully they will bring us closer to the enactment of the copyright revision bill. The decades since the enactment of the Copyright Act of 1909 have seen the invention of radio, television, cable television, and many other new technologies which have radically enlarged the range of communications. These new inventions have led not only to obsolescence of the old technologies of communicating literary and artistic works to the public, but have also greatly increased the complexity of the economic forces which guide the production and consumption of such works. One basic goal of the copyright law, however, remains unchanged: To encourage the creation of literary and artistic works by providing financia[illegible]ward to those who create them.

Copyright is a concern to all the inhabitants of the United States, but it is of particular importance to the people of California. Most programs are produced there and constitute the lifeblood of motion picture theatres, television stations, and cable systems throughout the nation. Copyright protection is an important incentive to the production of motion pictures. I have watched with great concern the shaping of copyright law revision dealing with the protection of copyrighted works when they are retransmitted from broadcasts by cable systems for profit without the consent of their copyright owners and without payment to the creators of these works. Let me add that this concern is shared not only by the producers of motion pictures and other producers of copyrighted television programs, but by the actors, writers, directors, composers and by all the members of the various crafts and trades which contribute to the production of these programs. These talents and workers do not hold copyrights of their own. They must necessarily look in part to the copyright fees collected by the producers for their own compensation, be it by way of initial payment or, under union agreements, as residuals based on the use and reuse of these programs on television. It is obvious, therefore, that if the producer collects nothing or little for the use of the program, those who contribute to the production are also deprived of fair compensation.

I do not have to dwell here on the financial difficulties encountered by many of the producers of motion pictures in my state. Nor would it appear necessary to mention details regarding the severe unemployment which exists in the motion picture industry.

Also of enormous importance to my state and the nation is the cable industry. While still in the development stages, predictions are that within the instant decade cable television may supersede broadcast television to the extent of sixty percent or more. While I do recognize that many cable stations have realized little or no profit as yet, to date even those cable systems which are in the black have not made any contribution to the cost of producing the films and tapes contained in the broadcasts whose signals the cable systems retransmit to their subscribers. A recent decision of the Second Circuit, now on appeal to the Supreme Court, mandates the principle of copyright payments for retransmission of films and tapes. I also understand that the principle of copyright payments was included in a Consensus Agreement entered into last year between the CATV and motion picture industries. The Consensus Agreement specifically provides for arbitration of royalties in the event that the parties should be unable to agree on the amount of the payments in time for inclusion into the copyright bill.

As the situation has evolved, cable operators and copyright owners have not been able to agree to a fixed fee and they have not arbitrated what the appropriate royalty should be. S. 1361 provides, in section III (d) (2), for a graduated system of fixed royalties which the copyright owners say are too low and the cable industry say are too high but acceptable. It is a fair and reasonable royalty rate under the compulsory license, but a wiser course for the Subcommittee to follow would be to provide for an independent rate-setting agency such as the Copyright Royalty Tribunal in the Library of Congress, the creation of which is already foreseen by the bill S. 1361 for the purpose of adjusting copyright rates.

There is ample precedent that similar responsibilities of the Congress in setting rates have been delegated appropriately and successfully to independent rate-setting agencies who proceed to fact-finding, hear economic evidence and then prepare or approve schedules submitted by the parties. This road has been followed both on the national and state level. Air fares are set by the Civil Aeronautics Board, railroad rates are approved by the Interstate Commerce Commission both for passenger and freight transportation, telephone rates are subject to approval by the Federal Communication; gas and electric power rates are approved by public utility commission. What all these rate-setting procedures have in common is that they involve complex facts and economic impact considerations which would make it too burdensome for the Congress to devote the time and staff efforts necessary to do justice to the parties concerned as well as to the public.

It seems to me that this principle is acknowledged by Sections 801 and 802 of the bill S. 1361 which provide for a readjustment of the royalty rates in periodic intervals. Surely, if the Congress has the power to delegate to the Tribunal the readjustment of the fees, it should have equal power to entrust this Tribunal with the setting of the rates from the outset.

Without such careful investigation which only a body having the time and expertise to weigh the facts and economic arguments before it can afford, the rates assessed may be either too high or too low. If they are too low, they would do unjustifiable harm to the program producing industry. If they are too high, they would be doing unnecessary damage to the cable industry.

The creative segment of our society has always enjoyed the special care and solicitude of the Congress because their talents and skills constitute a national treasure which would be dissipated only at the peril of reducing the vitality and quality of our cultural life. I, therefore, urge that very careful consideration be given to the need for adequate compensation of all those who create copyrighted works, and that where payments by cable systems are concerned, the best method to achieve this result will be to entrust the Copyright Royalty Tribunal in the Library of Congress or a similar Tribunal with the difficult task of setting rates from the outset.

COWAN, LIEBOWITZ & LATMAN, P. C.,
New York, N.Y., August 7, 1973.

THOMAS C. BRENNAN, Esq.,
Chief Counsel, Subcommittee on Patents, Trademarks and Copyrights, Russell Office Building, Washington, D.C.

DEAR MR. BRENNAN: At the hearing held on July 31, 1973 in connection with the revision of the Copyright Law a point arose on which we would specifically like to comment for the record on behalf of our client, The William & Wilkins Company.

Both Sen. McClellan and Sen. Burdick expressed concern as to how a copyright licensing program in the area of library photocopying could work without undue administrative headaches. The Williams & Wilkins plan is one solution to the problem. It works as follows:

Individual subscribers are charged the basic rate ranging from $10 to $60 and averaging $30. Local libraries would be charged an institutional rate which would be the basic rate plus a photocopying license fee. This photocopying fee ranges from $1 to $10 above the basic rate, depending on the size of the journal and its vulnerability to photocopying, and averages $3.65. This fee would be paid at the time the subscription was ordered or renewed and would permit the library to make within the library single copies of articles for its normal patrons. It should be noted that this is not an annual fee. It is paid once and lasts for the 56 year life of the copyright of each volume. If a library states that it does not photocopy, the $3.65 will be refunded. If the library does not have a work to photocopy, it can order a photocopy from one of some 500 lending libraries in the inter-library loan complex which would have a broader blanket license to photocopy, for a rate which would be up to twice the institutional rate.

Thus, this plan requires no bookkeeping. If a student in North Dakota wanted a copy of an article published in a Williams & Wilkins journal he would have no trouble in obtaining it. The library may charge him its expenses, as some do now, for obtaining the copy and might choose or not to add a few cents extra to help defray the cost of the subscription.

This simple plan is not presently in effect because the library community refuses to consider it until the Williams & Wilkins case is decided by the Court of Claims. Other publishers have not proposed licensing plans because of the hostile reaction to the Williams & Wilkins proposal. However, if the Court decides in Williams & Wilkins favor, fair use in this area will have been defined and publishers and the libraries can easily work out satisfactory licensing arrangements. After all, if a way could be found to collect music royalties from every bar and grill in the United States this relatively simpler problem can, we are sure, also be resolved.

Very truly yours,

ARTHUR J. GREENBAUM.

Xerox Corporation,
Stamford, Conn., August 9, 1973.

Re: Hearings on S. 1361, The Copyright Revision Bill

Thomas C. Brennan, Esq.,
Chief Counsel, Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights, U.S. Senate, Washington, D.C.

Dear Mr. Brennan: During the Subcommittee Hearings on the morning of July 31st, counsel for one of the witnesses made an oral comment that has been interpreted by some as meaning that Xerox Corporation has a photocopier which can determine automatically the number of pages of each publisher's copyrighted materials which have been copied.

Xerox copiers do have a counter to count the number of photocopies made. However, Xerox copiers do not have now—nor do we foresee the future technology having—the capability to discriminate automatically so as to classify copies made of works now in print in terms of source or of copyright status.

I would appreciate it if you would accept this letter as part of the record in order to clarify the situation insofar as Xerox Corporation is concerned.

In addition, I would like the letter to you of November 30, 1972 from C. Peter McColough, Chairman, Xerox Corporation, (a copy of which is enclosed for your ready reference) be made part of the record. I conclude by reiterating the last paragraph of the letter from Xerox' chief executive:

"Today, with a greater sense of urgency, we encourage you and the Subcommittee in your efforts for enactment of copyright revision by the 93rd Congress."

Sincerely,

Robert L. Shafter,
Counsel, Copyrights & Trademarks.

Xerox Corp.,
Stamford, Conn., November 30, 1972.

Re Copyrignt revision bill.

Thomas C. Brennan, Esq.,
Chief Counsel, Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights, U.S. Senate, Washington, D.C.

Dear Mr. Brennan: Thank you for your letter of September 19 on behalf of the Senate Subcommittee on Patents, Trademarks and Copyrights.

Xerox Corporation recommends the expeditious enactment of the pending general copyright revision since the bill, as a whole, is a sufficiently substantial advance over the present law—dating from 1909—to warrant prompt and favorable action by the Senate.

We also commend the voluntary efforts, albeit unsuccessful, of several publishing and library representatives for a detailed consensus on library photocopying. But we do not propose any changes in connection with the bill. Of course, if revision hearings are held by the Senate or the House, Xerox may request the opportunity to submit a statement.

We believe that statutory improvements, even those that may reflect pragmatic compromises, continue to be the necessary next step towards resolution of the challenging copyright problems surrounding the generation and prompt dissemination of information. In 1965, Xerox wrote the House Judiciary Committee: "We view with a sense of urgency the need to provide (copyright) legislation that is meaningful and effective . . . the protection of legitimate rights of authors is vital to the dissemination and exchange of information . . . sound copyright legislation is indispensable to the enrichment of our society . . ."

Today, with a greater sense of urgency, we encourage you and the Subcommittee in your efforts for enactment of copyright revision by the 93rd Congress.

Sincerely,

C. Peter McColough,
Chairman.

New York, N.Y., *August 8, 1973.*

Re Copyright law revision S. 1361, 93d Congress, first session.

Hon. John L. McClellan,
U.S. Senate, Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights, Senate Office Building, Washington, D.C.

Dear Senator McClellan: I wrote to you on January 26, 1973 and February 12, 1973, concerning the injury which I thought might inadvertently be done to people who make, exhibit or sell works of fine art under the proposed Copyright Law Revision legislation. Copies of those letters are enclosed for your convenience.

I understand that the Subcommittee on Patents, Trademarks and Copyrights is holding hearings on S. 1361 with a view to resolving open questions. I urge the Committee, at this time, to pay attention to the plight of the artist and to revise the bill to eliminate those provisions which would result in immediate forfeiture of rights in works of art simply by the act of putting them on public display.

I respectfully submit that the definition of "publication" contained in Section 101 of the proposed Copyright Law Revision bill, which includes "public display" of a copy (which includes the material object in which the work is first fixed), serves no legitimate public interest and will work severe hardship upon countless artists whose only avenue toward public recognition of their talents is to display the originals of their works.

The Copyright Revision Bill, in its proper concern for defining the rights and obligations of creators and users of works which must be mass produced by experienced technicians in order to be disseminated and which constitute the bulk of works subject to copyright protection, fails to recognize the essential difference between work of fine art and other copyrighted works.

A work of fine art is, almost by definition, unique and not reproduced in many copies. (I recognize that there are exceptions, such as limited editions of fine prints or sculpture, and perhaps since these editions must be manufactured by technicians, it might be argued that the ordinary copyright notice provisions should apply to them.) "Publication" of a work of fine art under the proposed Copyright Revision Bill can be made by the artist, the gallery owner, or anyone else totally ignorant of copyright requirements who acquires a work and puts it on display. To allow a manufacturer of greeting cards, wallpaper or calendars to make endless commercial reproductions of a work of fine art without paying the artist anything just because the original of the work was displayed to the public without a copyright notice seems to me to be grossly unfair and not justified by any public interest.

It is respectfully submitted that in order to avoid massive loss of rights in works of art by unknowing and unsophisticated artists, dealers and owners of those works who invariably display the originals without any copyright notice, the Copyright Law Revision Bill should be amended to provide specifically that the public display of an original work of fine art does not constitute publication.

I enclose for your consideration a reprint of an article I wrote which appeared in the Summer 1973 issue of the magazine "ARTnews." This article, entitled "For a Copyright Law to Protect the Artist," contains other recommendations for changes in the copyright revision bill intended to provide adequate protection to the artist while, at the same time, safeguarding any legitimate public interest in access to works of fine art.

Respectfully submitted,

CARL L. ZANGER.

[From ARTnews Summer 1973]

'ALMOST NO ONE IN THE FINE ARTS FIELD HAS ANY IDEA ABOUT THE COPYRIGHT LAW'

(By Carl L. Zanger[1])

A workshop on the legal and business problems of artists, art galleries and museums was conducted recently by the Practicing Law Institute, and I participated as an expert on copyright problems arising both under the present copyright law and under the revision bill that had been pending in Congress for many years.

The workshop was attended both by practicing lawyers and representatives of art galleries and museums and by others with an interest in the arts. And again I was made aware of the fact that almost no one active in the fine arts field—whether artist, gallery, museum, or lawyer—has any idea about the copyright law as it applies to the fine arts. It follows that they almost never obtain Federal copyright protection.

This widespread ignorance of copyright requirements has resulted in wholesale forfeiture by artists and their dealers of invaluable rights in works of art. Unless the art community in the U.S. achieves a better understanding, the scandalous practice of wholesale destruction of essential rights in works of art is likely to continue.

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[1] Carl L. Zanger is a New York attorney and lecturer on copyright problems of artists. He is a member of the Committee on Art of the Association of the Bar of the City of New York.

Under the U.S. copyright law, if a work of art is "published" without the form of copyright notice specified by law, the work goes into the public domain. This means that anyone can reproduce and sell copies of it for any use whatever—calendars, wallpaper, postcards or anything else—without permission of the artist or the owner of the work and without having to pay anyone for the right to use the work.

The copyright notice required under the law consists in its most expanded form of the word "copyright," the abbreviation "Copr," or the symbol ©, the name of the artist and year of publication. This notice may appear on the front or the back of the work, or on the permanent base, mounting or any other accessible part of the work.

In practice, almost no paintings bear copyright notices. In practice, almost no fine prints or sculpture (either those that are singly made or those that are part of larger editions) bear copyright notices. In practice, the world art community assumes—probably incorrectly under U.S. copyright law—that the artist retains the copyright in his work, even though the work is exhibited without restriction to the general public in a gallery or museum, and is offered for sale either singly or in multiple copies without any copyright notice.

The unfortunate result of the current widespread ignorance of copyright requirements is that most works of art that have been displayed publicly or offered for sale either in single or multiple copies have been "published" within the meaning of the copyright law. They are therefore in the public domain in the United States, unless the exhibition or sale was made under circumstances that either expressly or implicitly restricted the use the public could make of the work.

Why do artists neglect to copyright their work? Many who think about it at all resist using a copyright notice for fear of "cheapening" their work by making it appear to be commercial. Some may think that the notice must appear on the front of the work. And there are those who take the position that the conventional display in a gallery or museum does not amount to "publication." Except in unusual circumstances, this is an incorrect understanding.

For more than 15 years Congress and the U.S. Copyright Office have been trying to write a revised copyright law—the first general revision since the present law was enacted in 1909. This effort has been stalled for years by powerful and well-financed special-interest groups seeking preferred rights in copyrighted property.

The copyright revision bill introduced by Senator John McClellan in the current session of Congress establishes a simple pattern, as follows:

1. The public display of a copy of a work (which by statutory definition includes the original) constitutes "publication" of the work.

2. Copyright notice (the symbol © or the word "copyright" or the abbrevation "copr." with the year of first publication and the name of the copyright owner) must be placed on all publicly distributed copies of the work (including the original).

3. The location of the notice is to be established under rules to be adopted by the Copyright Office.

4. Copyright protection is forfeited if the required notice does not appear on copies of the work publicly displayed.

Taken together, these provisions would destroy the slender thread on which the art community pins its understanding that statutory copyright notice is not required for the protection of works of art. The proposed law would specifically overrule court decisions that hold that the display of a work of art under circumstances in which use and copying are carefully restricted does not constitute publication.

I find it difficult to believe that whoever drafted the bill intended to achieve such a result.

The copyright revision effort, which is being renewed in the current session of Congress, provides an opportunity to furnish statutory support for the practices and understandings that have evolved in the art community. I would make three specific proposals:

First, there is no reason why the same kind of copyright notice that is used for books and other kinds of property (which are "published" only after they have been manufactured and then widely disseminated in numerous copies) should be used for works of art, which the law as drafted would say are published when the artist puts them up for public display. Just as a manuscript is not "published" until it is reproduced in multiple copies and widely disseminated, the law should provide that a work of art is not "published" by display of the original, but only if and when copies are made and disseminated.

Second, to stem the huge loss of rights in works of art, the revision bill should provide that copyright notice for works of art may consist only of the name of the artist and the year. (This could result in loss of protection in many countries overseas—which can be achieved under international treaty only if the symbol © is also included in the copyright notice—but at least it would prevent total forfeiture of all rights.)

Finally, the bill should provide that whenever copyright notice is required to prevent forfeiture of rights in a work of art, that requirement should be deemed to be satisfied if the notice is placed on the front, back, permanent base, mounting, frame or any other accessible part of the work or any accompanying card or placard used to identify the work in normal use.

Each of these changes can easily be made in the copyright revision bill but unless the art community musters its strength to persuade Senator McClellan and other members of Congress to include acceptable provisions in the copyright revision bill, the scandalous loss of copyright protection of works of art will continue.

NEW YORK, N.Y., *January 26, 1973.*

Re: Copyright Law Revision

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Committee on the Judiciary,
Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: As a member of the Committee on Art of the Association of the Bar of the City of New York and the Committee on Copyright of the New York State Bar Association, I was asked to lecture at a workshop conducted by the Practicing Law Institute here in New York concerning the legal and business problems of artists, art galleries and museums. My assignment was to discuss copyright problems, arising both under the present copyright laws and under the proposed copyright law revision.

During the course of the workshop, which was attended both by practicing attorneys and representatives of art galleries, museums and others with an interest in fine arts, I was reminded forcibly of the fact that almost no one active in the fine art field—whether artist, gallery, museum, or attorney—has any idea about the copyright law as it applies to the fine arts.

As a practical matter, people involved with the fine arts almost never secure federal copyright protection, and, as was demonstrated in the recent case involving the Chicago Picasso monumental sculpture (*Letter Edged in Black Press, Inc. v. Public Building Commission of Chicago*, 320 F. Suppl 1303 [N.D. Ill., 1970]) when they try to secure statutory copyright protection, it's often too late. The art world doesn't understand federal copyright law, thinks that placing a copyright notice on a work is both an aesthetic insult and too "commercial", and in general reacts emotionally against securing copyright protection on the ground that it's not necessary and undignified.

In practice, almost no paintings by any American artists (or by artists of any other nationality) bear a copyright notice. In practice, almost no fine prints or sculpture (both those which are singly made and those which are part of larger editions) bear a copyright notice. In practice, the art community throughout the world assumes (probably incorrectly under the U.S. Copyright Law) that the artist retains the copyright in his work, despite the fact that the work is exhibited without restriction to the general public in a gallery or museum, and is offered for sale either singly or in multiple copies without any copyright notice.

I know that revision of the copyright law has been a major concern of yours for many years, and that a large number of powerful economic forces have been engaged in fierce combat over the precise form that the copyright revision package will take. However, in all the struggles and conflict, I don't think anyone has fully considered the impact of the proposed copyright revision on the art world—that is, those who make, exhibit or sell works conventionally considered to be works of art.

The copyright revision bill introduced in the last session of Congress (S644) provides in Section 302(a) that in general copyright in a work created after the effective date of the bill subsists from its creation. Section 301(a) eliminates the so-called "common law copyright" with respect to all works. Section 401 provides that copyright notice shall be placed "on all publicly distributed copies from which the work can be visually perceived" and Section 4.05 makes clear that if the notice is omitted, copyright is invalidated unless the omission is excused under the terms of that section.

Assuming that the term "copy" as used in Section 4.01 of the proposed law includes the original of a work of fine art (as it does under the present copyright law), the total impact of these provisions on works of fine art will be to eliminate a copyright protection from the vast majority of works created by American artists. I am sure that such a result was neither contemplated nor intended. However, in view of the traditional, deeply entrenched reliance by the art world on common law copyright protection, this unfortunate result will inevitably follow. I should point out that the impact is likely to be particularly severe on inexperienced new artists, who know only that they have pictures that they want to make and to have exhibited wherever they can, and do not have any idea about legal formalities for copyright notice required to protect their creations. All the young artist knows is that Rembrandt, Picasso and all of his other heroes never put © on a painting, and he is not likely to have an attorney to advise him that the law was changed.

In addition to the emotional reaction that many artists have against using a copyright notice for fear of "cheapening" their work by making it appear to be too commercial, a large number of contemporary artists do not so much as sign their work because they feel that signature disrupts the aesthetic unity of the composition. These artists view the copyright notice as a further desecration of their work.

I know that it is very late in the history of copyright revision to pose yet another problem. However, I respectfully submit that the most recent versions of the copyright revision bill fail to consider the special situation of fine artists, and may work inadvertent hardship on a vital segment of our cultural life.

The solution to the notice problem for works of art is not an easy one. However, I respectfully suggest that in the case of works of art, the requirement that copyright notice be placed on copies of works should specifically exclude original works of art, and that whenever a notice of copyright is required to obtain protection for a work of art, that requirement should be satisfied if on some reasonably accessable portion of a work (perhaps subject to standards set by the Copyright Office), the name of the copyright propretor appears together with the date of the work. This will conform substantially to current practice by artists, and would avoid wholesale destruction of the property rights of artists through inadvertence or lack of understanding of the new legal requirements.

I will be happy to discuss this matter further with the Committee or its counsel either in person or on the telephone and to provide whatever additional information or assistance I can.

Thank you for your attention to this problem.

Respectfully,

CARL L. ZANGER.

FEBRUARY 12, 1973.

Re: *Copyright Law Revision*

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Committee on the Judiciary,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MCCLELLAN: This will supplement my letter of January 26, 1973 in which I called attention to the injury which I thought might be done to people who make, exhibit or sell works of fine art under the Copyright Revision Bill introduced in the last session of Congress (S. 644).

In my letter of January 26, I outlined what I thought were the pertinent provisions of S. 644 that would operate to deprive artists of the protection they now think they have under common law copyright. I neglected in that letter to point out that the definition of "publication" in Section 101 provides, in pertinent part, that publication is the distribution of copies of a work to the public, and that public display constitutes publication. I also neglected to point out that the definition of "copies" in Section 101 provides that the term "copies" includes the material object in which the work is first fixed.

Under present law, the public display of a work of art does not constitute publication if the public understands that no copying of the work may take place. *American Tobacco Company* v. *Werckmeister*, 207 U.S. 284 (1907. The Copyright Law Revision Bill would reverse this decision.

I respectfully submit that the Copyright Law Revision Bill provides an excellent opportunity to furnish statutory support for the practices and understandings which have evolved in the art community and that the definition of publication and the notice requirements for works of art contained in the proposed Revision Bill be modified to reflect these practices. Specifically, I suggest that the Bill provide:

1. That the public display of a work of art does not constitute publication;
2. That the copyright notice for works of art may consist only of the name of the artist and the year; and
3. That the Bill provide expressly that where notice is required for works of art, it may be placed on the front, back, permanent base, mounting, frame or any other accessible portion of the work, or on any identifying card or placard which accompanies the work and is used to identify the work in normal use.

Respectfully,

Carl L. Zanger.

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